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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 125.

ABNER L. MERRILL, PLAINTIFF IN ERROR,

vs.

THE TOWN OF MONTICELLO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED SEPTEMBER 29, 1887.

It will be noticed that the foregoing cases are subsequent to *People* vs. *Holladay*, 68 Cal., 440, cited by appellant.

As the Brief of Appellant (p. 5) is limited to a contention for the strip within the green lines only—"Old Channel Street"—pursuant to stipulation upon the trial—Rec. p. 12, fol. 18—we do not feel warranted in extending our presentation of the case further, but respectfully submit that the decree of the Court below should be affirmed.

EVANS S. PILLSBURY AND
GORDON BLANDING,
Solicitors for Appellees.

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1 United States of America to the Town of Monticello, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein Abner L. Merrill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Circuit Court of the United States, District of Indiana.

Witness the Honorable William A. Woods, one of the judges of the circuit court of the United States for the district of Indiana, this 23d day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

WM. A. WOODS.

2 On this 24 day of Sept., in the year of our Lord one thousand eight hundred and eighty-seven, personally appeared W. H. Calkins before me, the subscriber, Wm. L. Sahse, a notary public, and makes oath that he delivered a true copy of the within citation to Hon. D. Turpie, att'y for def't in error.

W. H. CALKINS.

Sworn to and subscribed the 24 day of Sept., A. D. 1887.

[Seal Notary Public, Indiana.]

WILLIAM L. SAHSE,
Notary Public.

3 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States within and for the seventh circuit, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said circuit court, before you, between Abner L. Merrill, plaintiff, and The Town of Monticello, defendant, a manifest error hath happened, to the great damage of the said Abner L. Merrill, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Su-

preme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 23d day of September, A. D. 1887.

Seal Circuit Court of the United States, District of Indiana.

NOBLE C. BUTLER, *Clerk.*

4 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and eighty-six, before the Honorable William A. Woods, judge of the district court of the United States for said district and *ex officio* judge of said circuit court.

ABNER L. MERRILL
vs.
THE TOWN OF MONTICELLO. } Civil Action. 7260.

Be it remembered that heretofore, to wit, at the May term of said court, on the 1st day of July, 1881, the plaintiff, by Mess. Roache and Lamme, his attorneys, filed in the office of the clerk of said court his complaint in the above-entitled cause in the words following, to wit:

The plaintiff, Abner L. Merrill, of the city of Boston, in the State of Massachusetts, and a citizen of the State of Massachusetts, complains of the Town of Monticello, in the county of White, in the State of Indiana, and a citizen of the said State of Indiana, and says that heretofore, to wit, on the 20th day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto
5 attached representing the several installments of interest to mature on such said bond and obligation, and by which said bond and obligation the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the 20th day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York.

And the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered one (1), a copy of which said bond and coupons *are* hereto attached and made a part of this complaint, marked "Exhibit A."

That said coupon numbered two (2), which became due upon the 20th day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the prin-
6 cipal of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

2d. And the plaintiff, for 2d paragraph of complaint, says that heretofore, to wit, on the 20th day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the 20th day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York.

And the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered two, a copy of which said bond and coupons *are* hereto attached and made a part of this complaint, marked "Exhibit 2;" that said coupon numbered two (2), which became due upon the 20th day of May, 1880, was duly presented at the Importers' and
7 Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

3d. And the plaintiff, for 3d paragraph of complaint, says that heretofore, to wit, on the 20th day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the 20th day of May in each year, upon the presentation of the proper coupon, at the said Importers' and Traders' National Bank of New York.

And the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued
8 by said defendant and is numbered 3, a copy of which said bond and coupons *are* hereto attached and made a part of this complaint, marked "Exhibit 3;" that said coupon numbered two (2), which became due upon the 20th day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

4th. And the plaintiff, for 4th paragraph of complaint, says that heretofore, to wit, on the 20th day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the 20th day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of
9 New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 4, a copy of which said bond and coupons *are* hereto attached and made a part of this complaint, marked "Exhibit 4;" that said coupon numbered two (2), which became due upon the 20th day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

5th. And the plaintiff, for 5th paragraph of complaint, says that heretofore, to wit, on the 20th day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant

promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the
10 said bond at the rate of seven per cent. per annum, payable on the 20th day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 5, a copy of which said bond and coupons *are* hereto attached and made a part of this complaint, marked "Exhibit 5;" that said coupon numbered two (2), which became due upon the 20th day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bonds and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

6th. And the plaintiff, for 6th paragraph of complaint, says that heretofore, to wit, on the 20th day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders'
11 National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent per annum, payable on the 20th day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 6, a copy of which said bond and coupons *are* hereto attached and made a part of this complaint, marked "Exhibit 6;" that said coupon numbered two (2), which became due upon the 20th day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

7th. And the plaintiff, for 7th paragraph of complaint, says that heretofore, to wit, on the 20th day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto
12 attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the 20th day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 7, a copy of which said bond and coupons *are* hereto attached and made a part of this complaint, marked "Exhibit 7;" that said coupon numbered two (2), which became due upon the 20th day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

13 8th. And the plaintiff, for 8th paragraph of complaint, says that heretofore, to wit, on the 20th day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the 20th day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 8, a copy of which said bond and coupons *are* hereto attached and made a part of this complaint, marked "Exhibit 8;" that said coupon numbered two (2), which became due upon the 20th day of May, 1880, was duly presented at

the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, 14 the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

9th. And the plaintiff, for 9th paragraph of complaint, says that heretofore, to wit, on the 20th day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several intallments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the 20th day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is numbered 9, a copy of which said bond and coupons *are* hereto attached and made a part of this complaint, marked "Exhibit 9;"

that said coupon numbered two (2), which became due upon 15 the 20th day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

10th. And the plaintiff, for 10th paragraph of complaint, says that heretofore, to wit, on the 20th day of May, 1878, said town of Monticello made, executed, and delivered unto this plaintiff its certain bond and obligation in writing, with interest coupons thereto attached representing the several installments of interest to mature on such said bond and obligation, by which the said defendant promised to pay to bearer, at the Importers' and Traders' National Bank of New York, the sum of one hundred dollars ten years after the date of such said bond, and by the interest coupons thereto attached the said defendant promised to pay the interest on the said bond at the rate of seven per cent. per annum, payable on the 20th day of May in each year, upon the presentation of the proper coupon at the said Importers' and Traders' National Bank of New York; and the said bond and obligation further provided that the principal of the same should, at the option of the holder of the said bond, become due and

payable upon the non-payment, after presentation, of any of said coupons for ninety (90) days after the maturity thereof; which said bond is a series of $21,000 issued by said defendant and is
16 numbered 10, a copy of which said bond and coupons *are* hereto attached and made a part of this complaint, marked "Exhibit 10;" that said coupon numbered two (2), which became due upon the 20th day of May, 1880, was duly presented at the said Importers' and Traders' National Bank upon the maturity thereof and payment of the same refused, and the said coupon has remained and still remains due and unpaid, and the plaintiff, the holder of such said bond and coupons, has and does elect to declare the principal sum of such said bond and obligation due and payable.

Wherefore plaintiff demands judgment.

* * * * * * *

And afterwards, to wit, at the May term of said court, on the 27th day of September, 1881, before the Honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by W. E. Uhl, Esq., and David Turpie, Esq., its attorneys, and files its answer herein in the words following, to wit:

1st. The defendant for answer herein says it denies each and every allegation in the complaint contained.

2d. This defendant says that said town of Monticello is a corporation—that is, a body politic—duly organized under the laws of Indiana in pursuance of a statute of the State of date June 11th, 1852; that said coupons sued on and the bonds to which they are attached were executed by the defendant to the plaintiff
17 on the 20th day of May, 1878; that said coupons and the bonds to which they are attached were and purport upon their face to be issued for the purpose of "funding the debt or debts of the town of Monticello," this defendant, then existing; and this defendant says that on the 20th day of May, 1878, there was no power or authority given under the said act of June 11th, 1852, under which the defendant was incorporated or under any other statute of the State to an incorporated town to fund its existing indebtedness; and this defendant says that on the 20th day of May, 1878, it was an incorporated town of less than three thousand population and inhabitants and yet continues to be such; that such town under the law then—that is, on the day and year last aforesaid—in force and enacted had no power or authority, nor had the trustees, officers, or agents thereof any such power or authority, to fund any debt of said town whatever; and this defendant therefore says that no action ought to be or can be maintained upon the said pretended bonds or coupons against it, because the same were issued without any authority at law therefor, all of which the plaintiff well knew before he became the holder and owner thereof.

3d. This defendant further says that the said defendant is a town incorporated under the general law in the State of Indiana for the incorporation of towns, viz., the act of June 11th, 1852, of less than three thousand population and inhabitants; that as such incorpo-

rated town it had only such powers as were specially con-
18 ferred upon it by the act above cited or other acts of the Legislature of the State passed in addition thereto on the subject of town corporate powers; that on the 20th day of May, 1878, there was no law of the State giving to such towns the power to fund their indebtedness in any way; that said pretended bonds and coupons sued on were issued on the day and year last aforesaid to fund an indebtedness of said town, without any authority of law whatever; wherefore this defendant says they were and are utterly null and void as being *ultra vires* of the power of said town or the officers thereof to make and deliver the same.

4th. And this defendant, further answering, says that it is a town, incorporated under the general laws of the State of Indiana for that purpose, of less than three thousand inhabitants; that on the 20th day of May, 1878, when the coupons and bonds sued upon herein were issued and executed, said town had one only outstanding indebtedness unpaid then existing, which was the sum of $20,000, a debt incurred for the purpose of building, finishing, and completing a school-house for said town, for the refunding of which same debt the pretended bonds and coupons of the plaintiff were made and issued; that the said debt incurred for school purposes had before the 20th day of May, 1878, been already funded by the bonds and coupons of said town, issued therefor on the 1st day of June, 1869, then outstanding; that, being so already funded, said debt could not be refunded by the issue of said pretended bonds and coupons to the plaintiff herein without legislative authority for that pur-
19 pose; that the power to deal with said indebtedness for school purposes, having been exercised once by funding the same in bonds and coupons issued and outstanding therefor, was fully exhausted; that the said trustees of said town had no further power to again fund or to refund said indebtedness, but only to assess by and collect taxes in payment thereof, all of which the plaintiff well knew and had full notice and knowledge thereof before the 20th day of May, 1878, when, as is alleged, he became the holder and owner of said pretended bonds and coupons now herein sued upon.

5th. And this defendant further says that it is an incorporated town under the laws of the State of Indiana of less than three thousand inhabitants, its population being on the 20th day of May, 1878, about 1,500; that as such town it has only limited powers as to the contracting of indebtedness and the manner and mode thereof; and this defendant says, as to so much of the complaint herein as declares upon the provision in the bond therein recited that "the prinpal of the same should, at the option of the holder of said bond, became due and payable upon the non-payment, after presentation, of any of the coupons for ninety days after the maturity thereof," and so far as it is founded upon the option of the plaintiff to declare the principal due upon such non-payment, and so far as it proceeds upon notice of said option so declared by the plaintiff to this defendant, and so far as it demands judgment for the principal sum of said bonds or any of them, that said provision is totally null and void
20 by reason that said town or the trustees thereof had not by any

law or statute of said State concerning the indebtedness of incorporated towns any power or authority to make, enter into, or execute a contract or bond or obligation of such town with such provision therein; that, being without such authority, such bond as to such provision is utterly void, and such complaint as to such provision and the proceedings, option, declaration, and notice present no cause of action or ground of recovery herein; that said bonds upon their face are due May 20th, 1888, and are not due and cannot be made to mature before said date, and that therefore such portion of said demand so above recited as relates to the principal sum of such bonds is not yet due, and the suit as to so much thereof, having been brought prematurely, must fail and the said plaintiff take naught thereby.

W. E. UHL,
D. TURPIE,
Def't's Att'ys.

And afterwards, to wit, at the November term of said court, on the 18th day of November, 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the *defendant*, by Mess. Roache and Lamme, its attorneys, and files its demurrer to the answer herein in the words following, to wit:

Comes now the plaintiff and demurs to the 2d, 3d, 4th, and 5th paragraphs of the defendant's answer and to each of such said
21 paragraphs, and for cause of demurrer says that said paragraphs nor either of them contain facts sufficient to constitute a good defense to plaintiff's complaint.

ROACHE AND LAMME,
Attorneys for Pl'ff.

And afterwards, to wit, at the November term of said court, on the 7th day of February, 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by counsel, and the court, being duly advised in the premises, do now sustain the demurrer as to the 2d, 3d, 4th, and 5th paragraphs of the answer herein, and the defendant has leave to amend the answer by Monday, 20th February next, and day is given.

And afterwards, to wit, at the November term of said court, on the 20th day of February, 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by counsel, and by leave of the court thereto, heretofore granted, files its amended answer to the complaint herein in the words following, to wit:

The said defendant, by leave of court, for a further answer herein, says:

That on the 24th day of January, 1869, a petition was presented

to the board of trustees of The Town of Monticello, the defendant herein, by the school trustees of said town, praying for the issue of the bonds of said town to aid in the building of a school-
22 house therein, which petition was read and accepted and placed on the files of said board; and afterwards, on the same day and year last aforesaid, the board of trustees of said town did, in pursuance of said petition, adopt an ordinance and enter the same on the records of said town, directing that there should be made and issued to the school trustees of Monticello, White county, Indiana, twenty thousand dollars of coupon bonds of said town of the denomination of one hundred dollars each, with interest at the rate of ten per centum per annum, payable annually; and afterwards, to wit, on the 1st day of May, 1869, the said town made, executed, and issued its coupon bond- under said order to the amount of twenty thousand dollars, maturing in ten years from the date thereof, which bonds were sold and delivered to certain persons, who became purchasers, holders, and owners thereof; which said bonds so issued are yet now outstanding and unpaid obligations of said town in the hands of the holders and owners thereof as aforesaid, as to the principal sum thereof, and are and were the only indebtedness of said town.

And afterwards, to wit, on the 11th day of May, 1878, a petition was presented to the trustees of said town of Monticello by the owners of taxable property therein, which petition (omitting the names of the signers thereto) is in the words and figures following, to wit:

"We, the undersigned, citizens of the town of Monticello,
23 Indiana, and owners of the taxable property therein, respectfully petition that you, as trustees of said town, contract a loan for said town, for the purpose of paying the indebtedness thereof, in the sum of twenty-one thousand dollars.

(Signed)
(names.)

May 11, 1878.

And afterwards, to wit, on the same day and year last aforesaid, the board of trustees of said town entered in their record the following ordinance:

"Be it ordained by the board of trustees of the town of Monticello, Indiana, That said town issue bonds in the sum of twenty-one thousand dollars, in denomination of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town.

"And be it further ordained, That when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale.

"And be it further ordained, That said bonds shall not be sold at a price less than ninety-four cents on the dollar."

And afterwards, to wit, on the 20th day of May, 1878, there were made

and issued by the board of trustees of said town the coupon bonds of said town to the amount of twenty-one thousand dollars, bearing interest at the rate of seven per centum per annum, payable annually, and maturing, as to principal, in ten years after the date thereof, which said last-described bonds and coupons so made
24 as aforesaid were issued and entitled "Funding bond of the town of Monticello," described as being issued "for the purpose of funding the indebtedness of said town," as appears upon the face and in the body of said bonds, and which last-named bonds and coupons were and are the same bonds and coupons described in the complaint and sued upon by the plaintiff in this action, which said bonds, when so issued, were delivered to J. C. Wilson aforesaid under the ordinance aforesaid, who negotiated and sold the same upon his own account and converted the proceeds of the same to his own use. The said town of Monticello, the defendant, did not receive any of the proceeds thereof.

And this defendant further says that on the 20th day of May, 1878, there was no law of said State of Indiana which authorized the trustees of an incorporated town in said State to issue bonds of the town for the purpose of funding its indebtedness, and there was no law of said State at said date last aforesaid authorizing such incorporated town to issue its bonds for negotiation and sale for the purpose of paying its indebtedness or for the purpose of raising money to pay its indebtedness.

And this defendant further says that it is and was at the date last aforesaid an incorporated town of the State of Indiana, organized under the general law of said State for the incorporation of towns having a population of twelve hundred inhabitants. Wherefore the defendant says that the said bonds and coupons sued on were issued without any authority of law whatever and are utterly null and void.

25

D. TURPIE,
W. E. UHL,
Def't's Attorneys.

And the plaintiff is thereupon ruled to reply herein.

And afterwards, to wit, at the November term of said court, on the 28th day of March, 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Mess. Roache and Lamme, his attorneys, and files his demurrer to the amended answer of the defendant herein in the words following, to wit:

Comes now the plaintiff, Abner S. Merrill, and demurs to the amended answer of the defendant, The Town of Monticello, for the following reason, to wit: Because the amended answer does not state facts sufficient to constitute a good defense to plaintiff's complaint.

ROACHE AND LAMME,
Att'ys for Plaintiff.

And afterwards, to wit, at the May term of said court, on the 16th day of May, 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Mess. Roache and Lamme, his attorneys, and by leave of court files his amended complaint herein in the words following, to wit:

(See complaint as heretofore set out.)

26 And afterwards, to wit, at the May term of said court, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Roache and Lamme, his attorneys, and at the same time comes the defendant, by David Turpie, Esq., its attorney, and thereupon the plaintiff withdraws his amendment to the complaint heretofore filed herein and moves the court for leave to amend each paragraph of the complaint herein; which motion for leave to amend the court doth now overrule, and the plaintiff is ruled to reply herein by the 28 instant.

And afterwards, to wit, at the May term of said court, on the 18th day of June, 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Mess. Roache and Lamme and Mess. Harris and Calkins, his attorneys, and files his reply herein in the words following, to wit:

Par. 1st, For reply to the amended answer of the defendant, filed herein on February 20th, 1882, the plaintiff says he denies each and every material allegation in said answer contained, and demands proof thereof and judgment in his behalf.

Par. 2d. For a second paragraph of reply to said amended answer so filed on February 20th, 1882, herein the plaintiff says he admits that the defendant is a municipal corporation organized under the general laws of the State of Indiana for the incorporation of
27 towns, and was such corporation at all times mentioned in said answer and so now is. He admits that on May 1st, 1869, under and in pursuance of the act of March 11th, 1867, the said town issued its bonds in the sum of $20,000, due ten years after date, bearing ten per cent. interest, for the purposes of building and completing a school-house for and in said town under the petition and ordinance mentioned in said answer, and that said bonds were then and there sold and the money received used and applied for the purposes aforesaid.

At the time the last-mentioned bonds were issued the assessed value of all the property in said town for taxation purposes did not exceed in the aggregate the sum of four hundred thousand dollars ($400,000), and for the years 1870, 1871, 1872 the assessed value thereof did not exceed for either year the sum of four hundred thousand dollars, as shown by the appraisement and tax duplicates, of

which the same was assessed for taxation for public and municipal purposes, and the polls for each of said four years did not exceed two hundred in number, and by section third of said act of 1867 the tax authorized for the liquidation of the interest and principal of the bonds was limited to fifty cents on one hundred dollars of taxable property and one dollar on each poll; and plaintiff shows to the court that heretofore, to wit, on March 3d, 1873, the General Assembly of the State of Indiana passed an act to authorize cities and towns to sell bonds, &c. (Acts of 1873, p. 60, 1 Dav., 343), in the fourth section whereof the bonds of said town of Monticello aforesaid
28 then outstanding were legalized and made valid; and it was further provided by said section four that the taxes to pay such bonds and interest thereon should be levied and collected in accordance with the provision of said act, among which was this, to wit, that the taxes levied upon the assessed value of the property of said town for the payment of the interest accruing annually and the principal of said bonds when due should not in any year exceed fifty cents on any one hundred dollars of taxable property and one dollar on each poll; and it was further provided by said act that the treasurer of said town should keep an accurate account of the revenue arising from said special taxes and should apply the same to no other purpose than the payment of the interest and principal of such bonds.

At the time of the passage and taking effect of said act the assessed value of property in said town, subject to taxation for said purpose, as shown by the assessment-rolls, did not exceed the sum of four hundred thousand dollars, as aforesaid; that for the years 1874, 1875, 1876, 1877, 1878, 1879 the assessed value of the taxable property of said town for the purposes aforesaid, as shown by the records and assessment-rolls aforesaid, did not aggregate for any year the sum of four hundred thousand dollars, and the taxable polls for each and every of said years was less than two hundred.

And plaintiff further shows that said town, during the years
29 1869 to 1878, both inclusive, levied a special tax from year to year for the purpose of liquidating said bonds, but that the whole of the tax collected for that purpose *were* consumed each and every year in keeping down, paying, and discharging the interest accruing annually upon the said issue of bonds, and no sum was or could have been at any time set apart as a sinking fund for the liquidation of the principal of said bonds at maturity; and plaintiff shows that after the Legislature, by said act of March 8th, 1873, limited said tax as aforesaid it was impossible for said town to have made provision by a levy and collection to meet and discharge said bonds at maturity; and so plaintiff shows that it appearing to said town and the citizens thereof that it would not be able to meet, pay, and discharge said bonds maturing on May 1st, 1879, out of any revenues provided therefor by taxation or otherwise, and to prevent defalcation, did, on or about May 11th, 1878, present a petition, as in said answer set forth, asking said town to contract a loan in the sum of twenty-one thousand dollars for the purpose of paying off the indebtedness of said town, namely, the bonds aforesaid,

and that in pursuance of said petition the trustees of said town did on said day pass the ordinance, in said answer set forth, authorizing and providing for the issuance of its bonds in the sum of twenty-one thousand dollars, in denominations of one hundred each, bearing interest at the rate of seven per centum, to provide the means with which to pay the old bonds aforesaid, and appointed
30 J. C. Wilson, a citizen of said town and a member of the board of trustees, to negotiate and sell said bonds in the market for and on behalf of said town.

And plaintiff says it is true that afterwards, to wit, in pursuance of said petition of citizen tax-payers and of said ordinance, the said town did, on May 20th, 1878, make and issue two hundred and ten bonds, of the denomination of one hundred — each, bearing interest at the rate of seven per cent. per annum, payable annually, and maturing, as to the principal, in ten years after the date thereof, which bonds were then and there delivered by the said board of trustees of and for said town to said Wilson, as the officer and agent of said town empowered to negotiate and sell the same for said town; and plaintiff says that said Wilson, as the agent of said town, under and by virtue of the authority aforesaid, took and received said bonds and negotiated and sold the same afterwards, to wit, on June 1st, 1878, in the market, at par, for cash, and delivered said bonds to the purchaser for and on behalf of said town and received from said purchaser for and on behalf of said town the purchase-money, to wit, $21,000; and plaintiff denies that said Wilson sold said bonds upon his own account, as in said answer alleged, and plaintiff shows that thereafter, to wit, in the month of July, 1878, he purchased one hundred and forty-three of said bonds, being the bonds sued on in this action, in the open market, in the city of Boston, at par,
31 and paid cash therefor to the holder without any notice or knowledge on his part that said Wilson had failed and neglected to account with and pay over the money by him received to the defendant, and he denies the statement in said answer made that on May 20th, 1878, there was no law in force in the State of Indiana authorizing the issuance and sale of said bonds sued on, wherefore he prays judgment as in the complaint asked.

3 par. For a further and third paragraph of reply to the amended answer of the defendant filed herein on February 20th, 1882, plaintiff says he admits that the defendant, on the 1st day of May, 1869, issued its bonds to the amount of $20,000, bearing ten per cent. interest, due ten years after date, for the purpose of erecting and completing a school-house in and for said town under the laws of Indiana then in force; that said bonds were sold and the money realized therefrom used for that purpose. He says that said town made no provision for the payment of the principal of said bonds whatever, and that on May 11th, 1878, the town owed the sum of $21,000 thereon and had no money in its treasury, and could not, by levying a tax, raise the means to pay said bonds, soon coming due, at maturity, and he says that therefore, in order to prevent its said bonds from going to protest, the said town, by its legal board of trustees, did, on said day, pass the ordinance set forth in said answer; that afterwards, on May

20th, 1878, said town, by its proper officers and agents, made and executed and issued 210 bonds, of $100 each, under and in pursu-
32 ance of and in accordance with said ordinance, and delivered the same to said Wilson, who was a citizen of said town and a member of the board of trustees thereof, to be sold by him in the market to raise the money wherewith to meet and discharge the bonds issued on May 1st, 1869, then outstanding and unpaid. He says that said Wilson, as the agent of said town and not for himself nor on his account, as in said answer averred, afterwards, to wit, on the — day of June, 1878, negotiated and sold bonds in the market for the sum of $21,000 cash in hand paid to him as the agent of said town and for it, which he then and there received for and on behalf of said town, and not otherwise; that afterwards said bonds were placed upon the market in the city of Boston, Massachusetts, and plaintiff, on the — day of ——, 1878, purchased 143 of said bonds in the market of the then holder at par, and paid therefor cash down, being the bonds sued on in this action.

And plaintiff denies the truth of each allegation in said answer not hereinabove admitted to be true.

ROACHE AND LAMME,
HARRIS AND CALKINS,
Attorneys for Pl'ff.

And afterwards, to wit, at the May term of said court, on the 20th day of June, 1883, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

33 Comes now the defendant, by David Turpie, Esq., its attorney, and files its demurrer to the 2d and 3d paragraphs of the reply herein in the words following, to wit:

The defendant demurs to the second paragraph of the plaintiff's reply herein and says for cause that said second paragraph does not contain a statement of facts sufficient in law to constitute a defense to the answer therein replied to.

And the defendant demurs to the third paragraph of the plaintiff's reply herein and says for cause that the said third paragraph does not contain a statement of facts sufficient in law to constitute a defense to the answer therein replied to.

D. TURPIE,
W. E. UHL,
Def't's Att'ys.

And afterwards, to wit, at the November term of said court, on the 18th day of December, 1884, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and thereupon the court, being sufficiently advised in the premises, doth now overrule the demurrer to the reply herein; to which ruling of the court the defendant, by its attorneys, now here excepts.

And afterwards, to wit, at the May term of said court, on the 27th day of May, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties—the plaintiff by Harris and Calkins
34 and Roache and Lamme, his attorneys, and the defendant by D. Turpie and W. E. Uhl, its attorneys—and, this cause now coming on to be tried, the parties file their stipulation waiving a jury herein in the words following, to wit:

The plaintiff and defendant do now in open court waive a trial of the issues herein by jury and submit the same for trial to the court.

D. TURPIE,
W. E. UHL,
Att'ys for Def't.
HARRIS AND CALKINS,
ROACHE AND LAMME,
Att'ys for Pl'ff.

And thereupon this cause is now submitted to the court for trial without the intervention of a jury, and the court, having heard the evidence and argument of counsel, doth now take the same under advisement.

And afterwards, to wit, at the May term of said court, on the 2d day of November, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Harris and Calkins and Roache and Lamme, his attorneys, and by leave of court files his amended 4th paragraph of reply herein to the 6th paragraph of defendant's answer in the words following, to wit:

4th. The plaintiff, for further and additional paragraph reply to the defendant's sixth paragraph of answer, filed February 20th, 1882, says—

35 That he admits, as stated in said answer, that said Wilson was appointed by the said trustees of said town to sell and dispose of the bonds in the complaint and answer mentioned; that at the time of such appointment of said Wilson he executed to said town a bond, with sufficient sureties, conditioned for the faithful performance of his duty as such agent and the faithful application of the moneys arising from the proceeds of said bonds when sold, which bond was accepted and approved by the said town and the bonds in suit were delivered to him for negotiation and sale.

That afterwards said Wilson did sell and dispose of the bonds in suit, as well as other bonds, amounting to the sum of $21,000, par value, which was the total amount authorized by the said town at that time.

That said Wilson received therefor the total sum of $19,680.17; that after he had made the sale and had the proceeds in his hands and before accounting to the town he absconded and went to Can-

ada, where he now lives; that at the time he so absconded he left in the First National Bank of Monticello, Indiana, on deposit in his name as trustee the sum of $6,618.10, which sum was part of the proceeds arising from the sale of the bonds in suit; that the town of Monticello thereupon instituted suit in the proper court of the State of Indiana to recover and thereafter did recover said sum, to wit, $6,618.10, which was duly paid to said town; that said town in said suit against said Wilson recovered the said money on the ground that it was part of the proceeds of the sale of the very bonds in suit and deposited by said Wilson as trustee, and
36 the supreme court of the State of Indiana affirmed the judgment of the court below, and the money was thereupon paid as aforesaid to said town; that before that time and on the 25th day of June, 1880, the said town of Monticello, on proper proceedings begun in the proper courts of said State, had recovered final judgment against said Wilson on his bond executed by him in the manner and for the purposes aforesaid, which said judgment remains unreversed and in full force.

Wherefore the said plaintiff says that the said town of Monticello has ratified and affirmed the acts of the said Wilson in the premises, and having received from him the proceeds of the said bonds in suit cannot now delay or impeach their validity; wherefore he demands judgment accordingly.

ROACHE AND LAMME,
HARRIS AND CALKINS,
Att'ys for Pl'ff.

And thereupon comes the defendant, by Turpie and Uhl, its attorneys, and files its demurrer to said amended 4th paragraph of reply in the words following, to wit:

The defendant demurs to the amended paragraph of the plaintiff to the 5th paragraph of defendant's answer, and for cause shows that the same does not contain a statement of facts sufficient in law to constitute a defense to said paragraph of answer of the defendant.

D. TURPIE,
W. E. UHL, *Att'ys.*

37 And afterwards, to wit, at the November term of said court, on the 4th day of November, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Roache and Lamme and Harris and Calkins, his attorneys, and files his amended reply to the 6th paragraph of answer herein in the words following, to wit:

For a further and fourth amended reply to the sixth paragraph of the defendant's answer, filed February 20th, 1882, plaintiff says—

That he admits the defendant is a municipal corporation organized under the general laws of the State of Indiana for the incorporation of towns, and was such corporation as mentioned in the said answer and now is. He admits that on May 1st, 1869, under and in pursuance of the act of March 11th, 1867, the said town

issued its bonds in the sum of twenty thousand dollars, due ten years after date and bearing ten per cent. interest, payable semi-annually, for the purpose of building and completing a school-house for and in said town under the petition and ordinance mentioned in said answer, and accordingly said bonds were then and there sold and the money received used and applied for the purposes aforesaid.

At the time the said mentioned bonds were issued the assessed value of all the property in said town for taxation purposes did not exceed in the aggregate the sum of four hundred thousand
38 dollars, and for the years 1870, 1871, and 1872 the assessed value did not exceed for either year the sum of four hundred thousand dollars, as shown by the assessment and tax duplicates of said town, and the polls for each of said four years did not exceed two hundred in number; that by section three (3) of said act of 1867, for the liquidation of the interest and principal of the bonds, the levy for taxation was limited to fifty cents on the one hundred dollars taxable property and one dollar on each poll.

Plaintiff shows to the court that on March 3d, 1873, the General Assembly of this State passed an act to authorize cities and towns to sell bonds, &c. (Acts of 1873, p. 6; 1 Davis, 343), in the fourth section whereof the bonds of the said town of Monticello were legalized and made valid. It was further provided by said section four the levy to pay said taxes and interest thereon should be taxed and levied in accordance with the provisions of said act, among which was that taxes levied upon the assessed value of the property of said town for the payment of the interest accruing annually and the principal due should not in any one year exceed fifty cents on any one hundred dollars of taxable property and one dollar on each poll. It was further provided in said act that the treasurer of said town should keep an accurate account of the revenue arising from said special tax and should apply the same for no other purpose than to the payment of the interest and principal of such bonds.

At the time of the taking effect of said act the value of
39 property in said town subject to taxation for said purposes, as shown by the assessment and tax duplicate-, did not exceed the sum of four hundred thousand dollars as aforesaid, and that for the years 1874, 1875, 1876, 1877, 1878, and 1879 the assessed value of the taxable property of said town for the purposes aforesaid, as shown by the records, assessment-rolls, and tax duplicates as aforesaid, did not aggregate for any of said years the sum of five hundred thousand dollars, and the taxable polls for each and every of said years was less than two hundred.

Plaintiff further shows that said town during the years from 1869 to 1878, both inclusive, levied a special tax for each year for the purpose of liquidating said bonds, but that the whole of the taxes collected for that purpose was consumed each and every year in keeping down and paying the interest accruing on the said issue of bonds, and no sum was or could have been at any time set apart as a sinking fund for the liquidation of the said bonds at maturity.

Plaintiff says that after the Legislature, by said act of March 8th,

1873, limited said taxes as aforesaid it was impossible for said town to have made provisions by levy and collection of taxes to meet and discharge said bonds at maturity.

The plaintiff says that it appearing to said town and the citizens thereof that it would not be able to immediately pay off and discharge said bonds at maturity, to wit, May 1st, 1879, out of
40 any revenue provided therefor by taxation or otherwise, and in order to prevent defalcation, did, on or about the 11th day of May, 1878, present a petition, as in said answer set forth, asking said town to contract a loan in the sum of twenty-one thousand dollars for the purpose of paying off the indebtedness of said town, namely, the bonds aforesaid.

That, in pursuance of said petition, the trustees of said town did on said day pass the ordinance, in said answer set forth, authorizing and providing for the issuance of its bonds in the sum of twenty-one thousand dollars in denominations of one hundred dollars each, bearing interest at the rate of seven per cent. per annum, to provide the means with which to pay the old bonds aforesaid, and did appoint J. C. Wilson, a citizen of said town and a member of the board of trustees, to negotiate and sell said bonds in the market for and on behalf of said town.

The plaintiff says that it is true, as in said answer alleged, that afterwards, in pursuance of petition of citizen tax-payers and of said ordinance, the said town did, on May 20th, 1878, make and issue twenty-one thousand dollars of bonds of the denomination of one hundred dollars each, bearing interest at the rate of seven per cent. per annum, payable semi-annually, and maturing, as to the principal, in ten years after the date thereof, which bonds were then and there delivered by the said board of trustees of said town to said Wilson, as the officer and agent of said town empowered to negotiate and sell the same for it.

41 Plaintiff says that said Wilson, as the agent of said town and under and by virtue of the authority aforesaid, took and received said bonds and negotiated and sold the same in the market at and for the total sum of $19,680.17 cash in hand, and delivered said bonds to the purchasers for and on behalf of the town and received from the purchasers said sum of money.

And plaintiff denies that said Wilson sold said bonds upon his own account, as in said answer alleged, but, on the contrary, he sold the same as agent of said town.

The plaintiff shows that afterwards, in the month of July, 1878, he purchased one hundred and forty-three of said bonds, being the bonds in suit, in the open market in the city of Boston, and paid cash therefor to the holder without any notice or knowledge on his part that said Wilson had failed and neglected to account with and pay over the money by him received to the said town.

And the plaintiff further says that the town of Monticello took from the said Wilson at the time of placing said $21,000 of bonds in his hands for sale a bond, with security, conditioned for the faithful accounting to said town of the proceeds thereof; that said Wilson absconded and went to Canada before he accounted for the

proceeds of said bonds; that at the time he left this State he had on deposit, in cash, in the First National Bank of Monticello, Indiana, in his name as trustee the sum of $6,618.10, part and parcel of the money realized from the sale of said bonds which are now
42 in suit; that the town of Monticello thereupon instituted suit in the proper court of the State of Indiana to recover and did thereafter recover said sum, to wit, $6,618.10, from said Wilson and from said bank, which was duly paid to said town; that said town ever since has kept and used said money and appropriated it to its own use; that said town recovered said money in said action against said Wilson and said bank on the ground that said sum was the proceeds of the sale of the very bonds in suit, which had been deposited by said Wilson in said bank to his credit as trustee, and the supreme court of Indiana affirmed the judgment of the court below, and the money was thereupon paid to the said town, who has ever since kept, used, and appropriated the same; that before that time and on the 25th day of June, 1880, said town of Monticello, on proper proceedings begun in the proper courts of said State, did recover final judgment against said Wilson on his bond executed by him for the purposes aforesaid for the residue of said bonds, to wit, $15,000, which judgment was appealed from the Jasper circuit court to the supreme court of the State, when it was removed and remanded, after which the case was dismissed and wholly discontinued by said town.

Wherefore said plaintiff says that the said town of Monticello has ratified and affirmed the acts of the said Wilson in the premises, and, having received from him the proceeds of the said bonds
43 in suit or a part thereof, cannot now deny or impeach the action of the said Wilson in the sale thereof or their validity.

ROACHE AND LAMME,
HARRIS AND CALKINS,
Attorneys for Compl't.

And afterwards, to wit, at the November term of said court, on the 23d day of November, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by D. Turpie and W. E. Uhl, its attorneys, and files its demurrer to the amended 4th paragraph of plaintiff's reply to the sixth paragraph of defendant's answer herein in the words following, to wit:

The defendant demurs to the amended 4th paragraph of reply of the plaintiff to the sixth paragraph of the defendant's answer, and for cause shows—

That said paragraph of reply does not contain a statement of facts sufficient in law to constitute a defense to the said 6th paragraph of the defendant's answer.

D. TURPIE,
W. E. UHL,
Def't's Att'ys.

And afterwards, to wit, at the May term of said court, on the 19th day of October, 1886, before the Honorable Walter Q. Gresham
44 and Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and this cause now coming on to be heard is submitted to the court for trial without the intervention of a jury, and the court, having heard the evidence and argument of counsel and being sufficiently advised in the premises, finds for the defendant.

And afterwards, to wit, at the May term of said court, on the 21st day of October, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Roache and Lamme and Har-
45 ris & Calkins, his attorneys, and files his motion for a new trial herein in the words following, to wit:

Comes now the plaintiff in the above-entitled suit and moves the court for a new trial herein for the following reasons, to wit:

1st. The finding of the court is contrary to law.

2d. The finding of the court is contrary to the evidence and not sustained by the evidence.

Wherefore the plaintiff prays that a new trial may be granted, &c.

ROACHE AND LAMME,
HARRIS AND CALKINS,
Attorneys for Pl'ff.

And afterwards, to wit, at the November term of said court, on the 27th day of December, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and thereupon the court, being sufficiently advised, doth now overrule the motion of the plaintiff for a new trial.

It is thereupon ordered by the court that the plaintiff take nothing by his action herein, and that the defendant do recover of the plaintiff its costs and charges in this behalf laid out and expended, taxed at $—.

And the plaintiff now prays an appeal to the Supreme Court of the United States, which is granted upon his filing a bond in the sum of $1,000, with sureties to the approval of the court,
46 and sixty days is allowed for time to file a bill of exceptions.

And afterwards, to wit, at the November term of said court, on the 17th day of February, 1887, before the Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Roache and Lamme and Harris &

Calkins, his attorneys, and files his motion to set aside the judgment herein, which motion is in the words following, to wit:

The plaintiff, Abner L. Merrill, shows to your honors that on the 1st day of July, 1881, he filed his declaration in this court, founded upon certain municipal bonds issued by the defendant and of which the plaintiff was the owner, and asked a judgment thereon against the defendant, The Town of Monticello.

That afterward, to wit, on the 20th day of February, 1882, the said defendant filed its seven paragraphs of amended answer to said declaration, which were held good by the court, and an opinion was delivered thereon, which is reported in the — Federal Reporter, at page —.

That afterward, to wit, on the 18th day of June, 1883, the said plaintiff filed his replication to said answer in four paragraphs, three of which were special replies and are now remaining of record in said cause.

And the plaintiff shows to your honors that a demurrer was filed to the second and third paragraphs of said reply, which were
47 elaborately argued, and said demurrer was overruled on the 18th day of December, 1884, as reported in the — Federal Reporter, at page —.

That thereafter and by leave of the court a fourth paragraph of reply was filed, to which a demurrer was interposed, and which has never been ruled upon; and said demurrer was pending, undisposed of, at the time hereinafter mentioned, and which the plaintiff says was manifest error in the record and proceedings in said cause, because if said demurrer is sustained to said paragraph it presents a question of law of which the plaintiff might avail himself on appeal.

And the plaintiff shows to your honors that afterwards, to wit, on the 27th day of May, 1885, this cause was submitted to the court for trial, and the intervention of a jury was waived in writing by a stipulation of the parties entered of record.

That afterward the cause was partially heard, but before it was finally determined the said defendant asked that the presiding judge of the circuit court be called by the district judge to sit with him in the hearing and determining of the questions involved upon the evidence theretofore taken, heard, and reduced to writing and in the final hearing and determination of the cause.

And thereupon the said district judge did call on the presiding judge of the said circuit court to hear the said cause on its final argument upon the evidence already adduced and then in writing before said court.

48 And the plaintiff shows that said hearing took place on or about the 27th day of May, 1885, and that afterward, on the 19th day of October, 1886, the court ordered that finding and judgment be entered for the said defendant.

Afterward, on the 21st day of October, 1886, a motion for a new trial was filed by the plaintiff in said cause, which was, on the 27th day of December, 1886, overruled by the district judge, sitting as circuit judge, and an entry thereof duly made, and sixty days were

thereupon given to make and file a bill of exceptions, and said sixty days have not yet expired.

And the plaintiff now shows to your honors that he has prepared the bill of exceptions, and exhibits it herewith, containing all the evidence in said cause, and that the evidence supports the allegations of the declaration herein, as well as the second, third, and fourth paragraphs of his replication to the answer of said defendant, and that there is no conflict of evidence upon the points at issue whatever.

And the plaintiff shows that he is desirous of appealing said cause to the Supreme Court of the United States by writ of error duly issued as in such cases made and provided, but he shows to your honors that, under the rules and practice of said Supreme Court and statutes of the United States, he will not be able to present the questions involved in said cause to the Supreme Court unless your honors should make and find specially that the facts and evidence adduced on the trial supports said declaration and paragraphs of replication and each of them or one or more of them, and
49 that, notwithstanding such is the fact, the court is of opinion that the said plaintiff is not entitled to recover as against said defendant on said bonds sued on in said complaint.

And the plaintiff shows to your honors that a manifest hardship and injustice has been done him in said cause, which occurred in this way, namely, that the judge who presided and ruled upon said answer held the same sufficient, and that afterward, when the replications were filed and a demurrer was interposed to them, a different judge presided and ruled upon them, and that at the final hearing of the cause the plaintiff relied upon the evidence which supported and proved his said replication and did not require a special finding because of the fact that said replication had successfully resisted a demurrer, and, having proved them to be true, he supposed that there would either be a certificate of division between the said judges who heard and determined said cause, or that, if not, he would have saved to him by the record the questions of law involved in some other proper manner.

And the plaintiff shows to the court that the entry of the judgment took him wholly by surprise and was entirely unexpected, and he was, therefore, thrown off of his guard and did not, as he should have done, properly save the question by requesting beforehand a special finding.

That this was inadvertance on his part, caused by the fact that, having had his replication sustained, he had no doubt of the final judgment of the court being favorable to him, and was for
50 that reason surprised at the announcement of the general finding against him.

And the plaintiff further shows to your honors that he is fearful that he will be remediless to present to the Supreme Court the questions involved unless your honors shall set aside the order overruling the motion for a new trial and grant the same and find specially the facts as your petitioner believes them to be and as hereinbefore stated, and the plaintiff now invokes the aid of the

court in saving to him his rights, that he may be able to present the questions to the Supreme Court on a proper writ of error in this case.

The plaintiff therefore humbly prays that your honors will set aside the judgment overruling his motion for a new trial, and that your honors will sustain the same, to the end that he may be able to present the questions involved to the Supreme Court, as before stated.

ROACHE AND LAMME,
HARRIS AND CALKINS,
Attorneys for Pl'ff.

And afterwards, to wit, at the November term of said court, on the 18th day of February, 1887, before the Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by David Turpie, *his* attorney, and files *his* motion to set aside the application of the plaintiff filed herein on the 17th instant, which motion is in the words following, to wit:

51 The defendant moves the court to dismiss the motion of the plaintiff on file February 17th, 1887, for the reasons below given:

1st. The motion is not competent, because it prays the setting aside the action and a ruling upon a motion for a new trial without moving to set aside the judgment.

2d. The final judgment has been rendered in said cause, and no reasons are given or verified for setting aside the same.

3d. That the action or non-action of the court upon a demurrer, being part of the pleadings, is no cause for new trial, even if it had been set out as such cause, which it is not herein.

That the plaintiff failed to ask a special finding at the trial upon the facts and law of the case and the questions therein is no cause for a new trial or for any relief therein.

That the motion, made nearly 120 days after final judgment, is made without any diligence. If competent at all it should have been made upon any of the causes therein at the time the motion for new trial was made.

That surprise only relates to evidence upon trial, not to the finding or verdict upon trial.

That a special finding upon questions of fact and conclusions of law can only be required at the trial upon request of the parties. It is too late to make such request after the court has commenced its judgment, the announcement thereof, much more after the court has announced its judgment and many day- after the entry of said judgment.

52 Final judgment was entered in this case October 19th, 1886, being in the last May term hereof, not of the present term; that said judgment can only therefore be now set aside, if at all, by complaint and summons on the ground of mistake, inad-

vertance, surprise, or excusable neglect, neither of which causes are shown or verified in said application.

D. TURPIE.

And afterwards, to wit, at the November term of said court, on the 19th day of February, 1887, before the Honorable Walter Q. Gresham and Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

On motion, the complainant is given 30 days' additional time to make and file his bill of exceptions herein. This is in addition to the 60 days heretofore given.

And afterwards, to wit, at the November term of said court, on the 16th day of March, 1887, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

The court, being sufficiently advised in the premises, does now order that the time for filing bill of exceptions by the plaintiff in the said cause be, and the same is hereby, extended to April 20th, 1887.

And afterwards, to wit, at the November term of said court, on the 18th day of April, 1887, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

53 Come now the parties, by their respective attorneys, and upon consideration of the motion of the plaintiff filed February 17th, 1887, and of the objections of the defendant thereto, filed February 18th, 1887, which are in the words following, to wit:

It is ordered that the ruling heretofore made upon the plaintiff's motion for a new trial, whereby said motion was overruled, be, and the same is hereby, set aside, together with the judgment herein rendered; and it is further ordered that the said motion for a new trial be, and the same is now, sustained, and a new trial is granted; to which rulings and orders and to each of them separately the defendant now and here excepts, and is given sixty (60) days within which to file a bill of exceptions.

And afterwards, to wit, at the November term of said court, on the 23d day of April, 1887, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by David Turpie, Esq., its attorneys, and files its bill of exceptions to the order of the court of April 18th, 1887, in the words following, to wit:

Be it remembered that on the 18th day of April, 1887, the circuit court, being held by Judge Woods, of the district court, having under consideration the motion of the plaintiff of February 17th, 1887, filed by the plaintiff, and the counter-motion of February 18th,

54 1887, filed by the defendant, it was ordered that the ruling heretofore made upon the plaintiff's motion for new trial, wherein said motion was overruled, be, and the same is hereby, set aside; to which order the defendant excepted at the time and now excepts, and asks that this *his* bill of exceptions may be signed and sealed.

And the said district judge, acting as circuit judge aforesaid, on the same day aforesaid set aside the judgment hereinbefore rendered, and further ordered that the motion for a new trial herein be, and the same is, now sustained, and that a new trial be granted herein; to which rulings and orders, all and each of them, the defendant excepted at the time and does now except, and asks that this *his* bill of exceptions be now signed and sealed and made a part of the record, which is accordingly done this — day of April, 1887.

And afterwards, to wit, at the November term of said court, on the 26th day of April, 1887, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Now again come the parties, and this cause is submitted for trial, the intervention of a jury having been previously waived in writing, and, after hearing the evidence and argument of counsel and being duly advised in the premises, the court doth now make, at the request of the plaintiff, a special finding of all the facts in said cause in the words following, to wit:

55 Upon request of plaintiff in the above-entitled cause the court makes a special finding of the facts as follows:

1st. At the time hereinafter mentioned the defendant was a municipal corporation organized and existing under and by virtue of the laws of the State of Indiana and situate in the county of White, in the said State.

2nd. That upon the 24th day of January, 1869, a petition was presented to the board of trustees of said town by the school trustees thereof praying for the issue of the bonds of said town to aid in the building of a school-house in said town, which said petition was granted, and in pursuance thereof the trustees of said town did pass and adopt an ordinance directing that there should be made and issued to the said school trustees of said town twenty thousand dollars of coupon bonds of said town of the denomination of one hundred dollars each, with interest at the rate of ten per cent. per annum, payable annually; and afterwards, to wit, on the 1st day of May, 1869, the said town executed the said bonds under said ordinance to the amount of $20,000, maturing in ten years after the date thereof, which bonds were sold and delivered to certain persons, who then and there became the purchasers thereof, and which bonds at the times hereinafter mentioned were outstanding, unpaid, and valid obligations of the said town.

3d. On the 11th day of May, 1878, a petition was presented to the board of trustees of the defendant, signed by citizens, owners of taxable property in said town, praying for the issue of bonds of said

town to the amount of $21,000, which petition (omitting the names of the signers thereto) is in the words following, to wit:

"We, the undersigned, citizens of the town of Monticello,
56 Indiana, and owners of the taxable property therein, respectfully petition that you, as trustees of said town, contract a loan for said town for the purpose of paying the indebtedness thereof in the sum of twenty-one thousand dollars."

May 11th, 1878.

(Signed names.)

That thereupon the board of trustees of the defendant passed and entered of record the following ordinance, to wit:

"Be it ordained by the board of trustees of the town of Monticello, Indiana, That said town issue bonds in the sum of twenty-one thousand dollars in denominations of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town. And be it further ordained that when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale. And be it further ordained that said bonds shall not be sold at a price less than ninety-four cents on the dollar."

4th. That upon the 20th day of May, 1878, in pursuance of the said petition and ordinance, the said defendant town made and executed its 210 coupon bonds, payable to bearer, of the denomination of $100 each, bearing interest at the rate of seven per centum per annum, which bonds and coupons are in the words and figures following, to wit:

"No. 1. UNITED STATES OF AMERICA, $100.

"*State of Indiana.*

"*Funding Bond of the Town of Monticello.*

"Ten years after date the town of Monticello, in the county of White, State of Indiana, promises to pay to the bearer, at the Importers' and Traders' National Bank, New York, one hundred
57 dollars in gold, with interest thereon at the rate of seven per centum per annum, payable annually, in gold, at the same place, upon presentation of the proper coupon hereto attached, without any relief whatever from the valuation or appraisement laws of the State of Indiana. The principal of this bond shall be due and payable, at the option of the holder, on the non-payment, after due presentation, of any of said coupons for ninety days after the maturity thereof. This bond is one of a series of $21,000 authorized by the said town by an ordinance passed by the board of trustees thereof on the 13th day of May, 1878, for the purpose of funding the indebtedness of the said town.

"In witness whereof the board of trustees of the town of Monticello have caused this bond and the coupons thereof to be signed

by their president and clerk and the seal of the town to be affixed hereto, at the said town of Monticello, this twentieth day of May, 1878.

"R. W. CHRISTY, *President.*

"Attest: F. BOSINGER, *Clerk.*"

(*Copy of Coupon.*)

"The town of Monticello, Indiana, will pay the bearer, in gold coin, seven dollars, without relief from valuation or appraisement laws of the State of Indiana, at the Importers' and Traders' National Bank, New York, on the twentieth day of May, 1880, being one year's interest on bond No. 1.

"R. W. CHRISTY, *President.*

"Attest: F. BOSINGER, *Clerk.*"

5th. That the said bonds were put in the hands of the
58 said J. C. Wilson, in pursuance of said ordinance, for sale, and that $14,300 of the said bonds, being the same as those now in suit, were sold to Claypool and Stoddard, of Indianapolis, Indiana, for which the said firm of Claypool and Stoddard paid to the said Wilson the sum of $12,918.40, which said last-named sum was paid to the said Wilson in the following manner: On or about April 14th, 1879, said Claypool and Stoddard, by the direction of said Wilson, paid a draft, drawn by G. A. Ivers, of Chicago, for $6,000; on same day said Claypool and Stoddard paid said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $5,000; that on the 13th day of May, 1879, the said Claypool and Stoddard paid to said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $1,840.30, and within a few days after the last-named date said Claypool and Stoddard, for the balance of the said sum of $12,918.40, paid to him the sum of $78.17.

6th. That the board of trustees of said town required and exacted from their said agent, J. C. Wilson, a bond, with sureties, to secure the money which he might realize from the sale of said bonds.

7th. That the said Wilson, after the sale of said bonds, failed to turn over the proceeds thereof to the treasurer of the said town and fled the country.

8th. That at the time the said Wilson fled the country he had a large sum of money on deposit in the First National Bank of Monticello, Indiana, to his credit as "trustee;" that suit was instituted by the defendant town against said bank to recover the same, upon the ground that such money was the proceeds of the sale of said bonds so made by the said Wilson; that judgment was rendered in favor of said town against said bank for the sum of $6,988.43;
59 that thereupon the receiver of the said bank appealed to the supreme court of Indiana, and thereupon said judgment was affirmed by said supreme court (Bundy, receiver, &c., *vs.* Town

of Monticello, 84th Ind., 119), and said town recovered the sum of $6,988.43.

9th. That the said town instituted a proceeding upon the bond so given by the said Wilson to the said town to secure the money which he might realize from the sale of said bonds, and in a court of competent jurisdiction recovered judgment against the sureties and the said Wilson on the said bond for the full amount of the proceeds arising from the sale of said bonds, and from which judgment an appeal was taken to the supreme court of Indiana and reported in 85 Indiana Reports, at page 10, and which said judgment was reversed and remanded by said supreme court for another trial, and afterwards the said suit was dismissed by the said town, and that the said town has received nothing on account of said bond.

10th. That at the time of the issuing of the bonds in suit there was in the town treasury $3,047.85, and no more, received under the taxing act of the Legislature of Indiana under which the bonds were issued as a special fund for the payment of the $20,000 ten per cent. bonds then outstanding, and that under the laws of the State of Indiana a sum sufficient to pay said bonds could not have been raised before maturity of the same on the amount of taxable property in said town.

11th. That the plaintiff is a resident of Newton, in the State of Massachusetts, and that he bought the bonds in suit in open market, in the city of Boston, as an investment, and paid therefor a valuabe consideration, without any notice of any irregularity as to their issue or any claim to that effect.

And the court further finds that the principal of the bonds
60 sued on is wholly unpaid, and that the interest upon the same accrued is wholly unpaid from the 20th day of May, 1880.

And the court further finds as a conclusion of law upon the foregoing facts for the defendant.

And the plaintiff, Abner L. Merrill, objects and excepts to the conclusion of law so stated by the court upon said findings.

And thereupon the above and foregoing bill of exceptions is now made and tendered by the plaintiff, and which, being examined, is now approved by the court, and the same is ordered to be made a part of the record and is now signed by the judge of said court this 26th day of April, 1887.

WM. A. WOODS,
U. S. Judge.

And upon which findings the court finds for said defendants.

61 It is therefore ordered and adjudged that the plaintiff take nothing by his said action, and that the defendant do recover of and from the plaintiff his costs herein laid out and expended, taxed at $—; to which said judgment, upon said finding of facts, the said plaintiff doth now object and except, and doth now pray the court that a writ of error be granted therefrom to the Supreme Court of the United States. The premises considered, the court doth now grant such writ of error, and doth now fix the bond of said

plaintiff in the sum of one thousand dollars, with good and sufficient sureties, to be approved by the clerk of this court; and the said plaintiff doth now present his bill of exceptions, preserving the special findings of fact and the conclusions of law thereon of this court, which is in the words following, to wit:

Be it remembered that the following stipulation was made and signed by the respective parties to this action and filed in the office of the clerk of said court on the 27th day of May, 1885, in open court, to wit:

The plaintiff and defendant do now, in open court, waive a trial of the issues herein by a jury and submit the same for trial to the court.

D. TURPIE AND W. E. UHL,
Attorneys for Defendant.
HARRIS & CALKINS, AND
ROACHE & LAMME,
Attorneys for Plaintiff.

Be it further remembered that on the 26th day of April,
62 1887, said cause, being at issue, is now submitted to the court for trial, and the plaintiff requested the court to find specially all the facts in said cause and state the conclusions of law thereon; and the court doth now find all of the facts in said cause and states its conclusions of law thereon as follows:

Upon request of the plaintiff in the above-entitled cause the court makes a special finding of the facts as follows:

1st. At the times hereinafter mentioned the defendant was a municipal corporation, organized and existing under and by virtue of the laws of the State of Indiana, and situate in the county of White, in the said State.

2d. That upon the 24th day of January, 1869, a petition was presented to the board of trustees of said town by the school trustees thereof, praying for the issue of the bonds of said town to aid in the building of a school-house in said town, which said petition was granted, and in pursuance thereof the said trustees of said town did pass and adopt an ordinance directing that there should be made and issued to the said school trustees of said town twenty thousand dollars of coupon bonds of said town, of the denomination of one hundred dollars each, with interest at the rate of ten per cent. per annum, payable annually; and afterward, to wit, on the 1st day of May, 1869, the said town executed the said bonds under said ordinance to the amount of $20,000, maturing in ten years after the date thereof, which bonds were sold and delivered to certain persons,
who then and there became the purchasers thereof, and which
63 bonds, at the times hereinafter mentioned, were outstanding, unpaid, and valid obligations of the said town.

3d. On the 11th day of May, 1878, a petition was presented to the board of trustees of the defendant, signed by citizen owners of the taxable property in said town, praying for the issue of bonds of said town to the amount of $21,000; which petition (omitting the names of the signers thereto) is in the words following, to wit:

"We, the undersigned, citizens of the town of Monticello, Indiana, and owners of the taxable property therein, respectfully petition that you, as trustees of said town, contract a loan for said town, for the purpose of paying the indebtedness thereof, in the sum of twenty-one thousand dollars."

May 11th, 1878.

(Signed names.)

That thereupon the board of trustees of the defendant passed and entered of record the following ordinance, to wit:

"Be it ordained by the board of trustees of the town of Monticello, Indiana, That said town issue bonds in the sum of twenty-one thousand dollars, in denominations of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town. And be it further ordained that when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale. And be it further ordained that said bonds shall not be sold at a price less than ninety-four cents on the dollar."

64 4th. That upon the 20th day of May, 1878, in pursuance of the said petition and ordinance, the said defendant town made and executed its 210 coupon bonds, payable to bearer, of the denomination of $100 each, bearing interest at the rate of seven per cent. per annum; which bonds and coupons are in the words and figures following, to wit:

No. 1. UNITED STATES OF AMERICA, $100.

State of Indiana.

Funding Bond of the Town of Monticello.

Ten years after date the town of Monticello, in the county of White, State of Indiana, promises to pay to the bearer, at the Importers' and Traders' National Bank, New York, one hundred dollars in gold, with interest thereon at the rate of seven per cent. per annum, payable annually, in gold, at the same place, upon presentation of the proper coupon hereto attached, without any relief whatever from the valuation or appraisement laws of the State of Indiana. The principal of this bond shall be due and payable, at the option of the holder, on the non-payment, after due presentation, of any of said coupons for ninety days after the maturity thereof. This bond is one of a series of $21,000 authorized by the said town by an ordinance passed by the board of trustees thereof, on the 13th day of May, 1878, for the purpose of funding the indebtedness of the said town.

In witness whereof the board of trustees of the town of Monticello have caused this bond and the coupons thereof to be signed
65 by their president and clerk and the seal of the town to be affixed hereto, at the said town of Monticello, this twentieth day of May, 1878.

R. W. CHRISTY, *President.*

Attest: F. BOSINGER, *Clerk.*

(*Copy of Coupon.*)

The town of Monticello, Indiana, will pay the bearer, in gold coin, seven dollars, without relief from valuation or appraisement laws of the State of Indiana, at the Importers' and Traders' National Bank, New York, on the twentieth day of May, 1880, being one year's interest on bond No. 1.

R. W. CHRISTY, *President.*

Attest: F. BOSINGER, *Clerk.*

5th. That the said bonds were put in the hands of the said J. C. Wilson, in pursuance of said ordinance, for sale, and that $14,300 of the said bonds, being the same as those now in suit, were sold to Claypool and Stoddard, of Indianapolis, Indiana, for which the said firm of Claypool and Stoddard paid to the said Wilson the sum of $12,918.40, which said last-named sum was paid to said Wilson in the following manner: On or about April 14th, 1879, said Claypool and Stoddard, by the direction of said Wilson, paid a draft drawn by G. A. Ivers, of Chicago, for $6,000; on the same day said Claypool and Stoddard paid said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $5,000; that on the 13th day of May, 1879, the said Claypool and Stoddard paid to said Wilson, by their check on the First National Bank of
66 Indianapolis, the further sum of $1,840.30, and within a few days after the last-named date said Claypool and Stoddard, for the balance of the said sum of $12,918.40, paid to him the sum of $78.17.

6th. That the board of trustees of said town required and exacted from their said agent, J. C. Wilson, a bond, with sureties, to secure the money which he might realize from the sale of said bonds.

7th. That the said Wilson, after the sale of said bonds, failed to turn over the proceeds thereof to the treasurer of the said town and fled the country.

8th. That at the time the said Wilson fled the country he had a large sum of money on deposit in the First National Bank of Monticello, Indiana, to his credit as "trustee;" that suit was instituted by the defendant town against said bank to recover the same, upon the ground that such money was the proceeds of the sale of said bonds so made by the said Wilson; that judgment was rendered in favor of said town and against said bank for the sum of $6,988.43; that thereupon the receiver of the said bank appealed to the supreme court of Indiana, and thereupon said judgment was affirmed by said supreme court—Bundy, receiver, &c., *vs.* Town of Monticello, 84 Ind., 119—and said town recovered the sum of $6,988.43.

9th. That the said town instituted a proceeding upon the bond so given by the said Wilson to the said town to secure the money which he might realize from the sale of said bonds, and in a court of competent jurisdiction recovered judgment against the sureties
67 and the said Wilson on the said bond for the full amount of the proceeds arising from the sale of said bonds, and from which judgment an appeal was taken to the supreme court of Indiana and reported in 85th Indiana Reports, at page 10, and which

said judgment was reversed and remanded by said supreme court for another trial, and afterwards the said suit was dismissed by the said town, and that the said town has received nothing on account of said bond.

10th. That at the time of the issuing of the bonds in suit there was in the town treasury $3,047.85, and no more, received under the taxing act of the Legislature of Indiana, under which the bonds were issued as a special fund for the payment of the $20,000 ten per cent. bonds then outstanding, and that under the laws of the State of Indiana a sum sufficient to pay said bonds could not have been raised before the maturity of the same on the amount of taxable property in said town.

11th. That the plaintiff is a resident of Newton, in the State of Massachusetts, and that he bought the bonds in suit in open market in the city of Boston, as an investment, and paid therefor a valuable consideration, without any notice of any irregularity as to their issue or any claim to that effect.

And the court further finds that the principal of the bonds sued on is wholly unpaid, and that the interest upon the same accrued is wholly unpaid from the 20th day of May, 1880.

And the court finds, as a conclusion of law upon the foregoing facts, for the defendant; and the plaintiff, Abner L. Merrill,
68 objects and excepts to the conclusions of law so stated by the court upon said findings.

And thereupon the above and foregoing bill of exceptions is now made and tendered by the plaintiff, and which, being examined, is now approved by the court, and the same is ordered to be made a part of the record, and is now signed by the judge of said court this 26th day of April, 1887.

And the same is now examined, approved, and signed in open court, and the same is made a part of the record in this cause.

Stipulation.

Under the statute of Indiana a separate paragraph of complaint is required on each bond and coupon sued on. The foregoing record contains ten (10) paragraphs of the complaint, in each of which the bonds and coupons are copied and referred to as exhibits to such paragraphs. The whole number of bonds sued on is one hundred and forty-three (143). It is stipulated and agreed that each of the paragraphs of the original complaint, containing in all 143 paragraphs, is, with respect to their contents and the exhibit, copies of bonds & coupons therein referred —, identical and the same with those set out in the ten paragraphs contained in the foregoing record, with the exception of date of maturity of coupons and the numbers. It is therefore stipulated and agreed that the foregoing is a complete record of the cause herein as to the said paragraphs and exhibits.

HARRIS & CALKINS,
Att'ys for Pl'ff in Error.
D. TURPIE,
W. E. UHL, *Def't's Att'ys.*

69 Copy.

Supreme Court of the United States.

ABNER L. MERRILL
vs.
THE TOWN OF MONTICELLO. } No. 7260.

Know all men by these presents that we, Abner L. Merrill, as principal, and George L. Ilsley, of Exeter, in the State and district of New Hampshire, and Henry R. Merrill, of Boston, in the State and district of Massachusetts, as sureties, are held and firmly bound unto the above-named Town of Monticello in the sum of one thousand dollars ($1,000.00), to be paid to said Town of Monticello; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals and dated this 21st day of June, 1887.

70 Whereas the above-named Abner L. Merrill hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana: Now, therefore, the condition of this obligation is that if the above-named Abner L. Merrill shall prosecute his said writ of error to effect and answer all costs and damages that may be adjudged or awarded against him if he shall fail to make good his plea, then this obligation to be void; otherwise in full force.

ABNER L. MERRILL. [SEAL.]
GEO. L. ILSLEY. [SEAL.]
HENRY R. MERRILL. [SEAL.]

Sealed and delivered in presence of—
JOHN G. STETSON.

BOSTON, MASS., *June* 21, 1887.

I, Le Baron B. Colt, judge of the circuit court of the United States for the first circuit, within which the district of Massachusetts is, after due inquiry, approve the above sureties as sufficient.

LE BARON B. COLT,
U. S. Circuit Judge.

Approved this June 23, '87.

W. A. WOODS.

71 I, George L. Ilsley, of Exeter, in the State of New Hampshire, on oath depose and say that I own unincumbered real estate in Chelsea, Mass., worth ten thousand dollars ($10,000.00) above all incumbrance. I have personal property worth five thousand dollars ($5,000.00) and I am worth fifteen thousand dollars ($15,000.00) above all debts and liabilities.

GEO. L. ILSLEY.

I, Henry R. Merrill, of Boston, in the State of Massachusetts, on oath depose and say that I own unincumbered real estate in said

Boston and Brookline worth ten thousand dollars ($10,000.00). I have personal property worth one thousand dollars ($1,000.00) and I am worth ten thousand dollars ($10,000.00) above all debts and liabilities.

HENRY R. MERRILL.

UNITED STATES OF AMERICA, }
Massachusetts District, } ss:

JUNE 22, 1887.

Subscribed and sworn to before me—

JOHN G. STETSON,
Commissioner U. S. C. C., Mass. Dist.

[Endorsed:] No. —. Abner L. Merrill *vs.* Town of Monticello.

72 UNITED STATES OF AMERICA, }
District of Indiana, } ss:

I, Noble C. Butler, clerk of the circuit court of the United States for said district, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record of the cause of Abner L. Merrill *vs.* The Town of Monticello, No. 7260, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 29th day of July, 1887.

Seal Circuit Court of the United States, District of Indiana.

NOBLE C. BUTLER, *Clerk.*

Endorsed on cover: Indiana C. C. U. S. No. 125. Abner L. Merrill, plaintiff in error, *vs.* The Town of Monticello. Filed September 29, 1887.

SEP 13 1890
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 125.

ABNER L. MERRILL,
PLAINTIFF IN ERROR,
vs.
THE TOWN OF MONTICELLO,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

ADDISON C. HARRIS,
Attorney for Plaintiff in Error.

Journal Job Print, Indianapolis.

Boston and Brookline worth ten thousand dollars ($10,000.00). I have personal property worth one thousand dollars ($1,000.00) and I am worth ten thousand dollars ($10,000.00) above all debts and liabilities.

HENRY R. MERRILL.

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Massachusetts District, }

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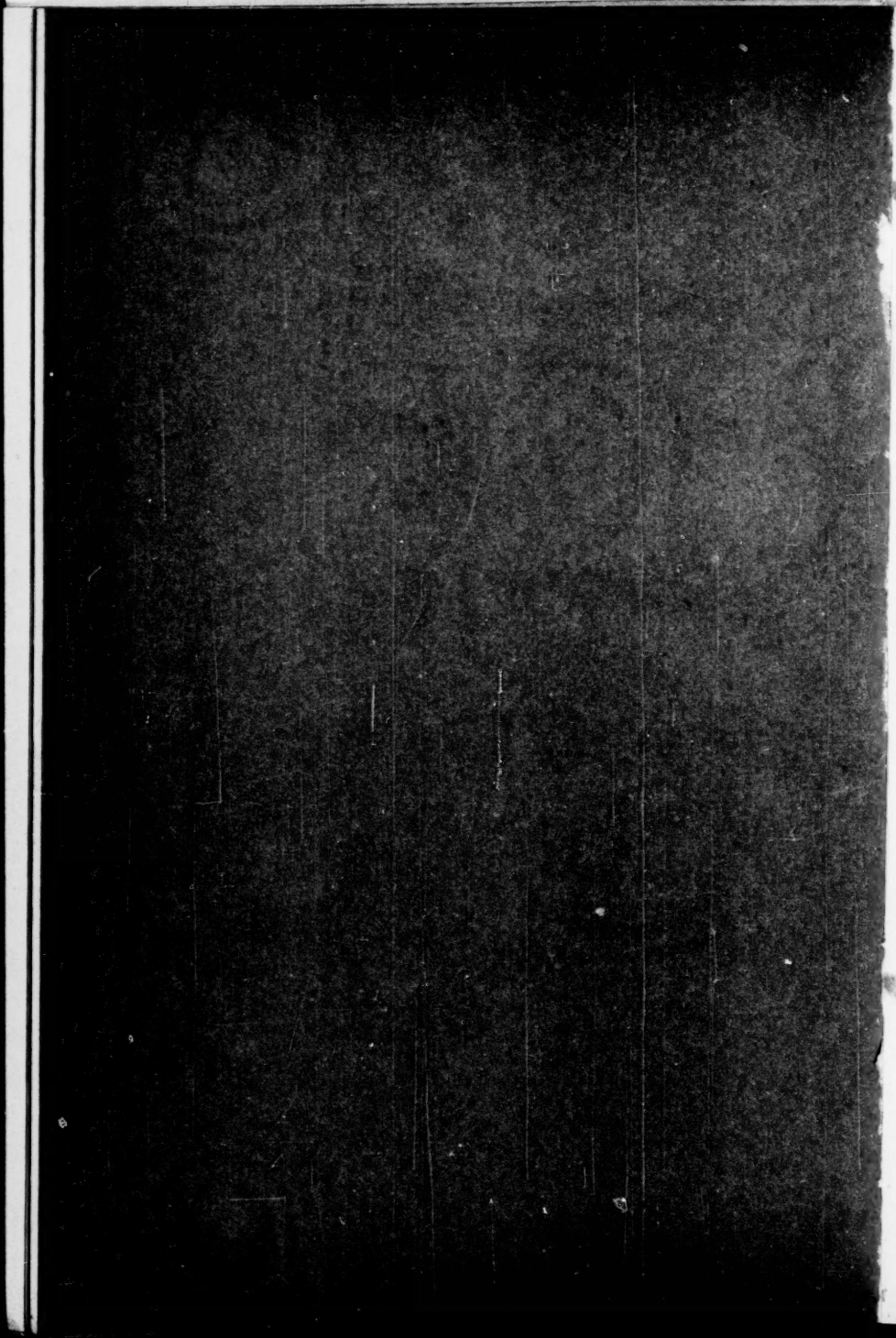

IN THE

Supreme Court of the United States.

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DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

I. Declaration.

1. On July 1, 1881, Merrill sued the incorporated town of Monticello in *assumpsit*, on 143 town bonds hereafter described. The defendant filed the general denial and four special answers questioning the validity of the bonds, which special answers were held bad on demurrer. (Transcript, pp. 2–10.)

2. The defendant then by leave filed an amended answer in one paragraph (afterwards called the sixth), as follows:

II. Amended Answer.

At the November term of said court, on the 20th day of February, 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the defendant, by counsel, and by leave of the Court thereto, heretofore granted, files its amended answer to the complaint herein in the words following, to-wit:

The said defendant, by leave of court, for a further answer herein, says: That on the 24th day of January, 1869, a petition was presented to the Board of Trustees of The Town of Monticello, the defendant herein, by the school trustees of said town, praying for the issue of the bonds of said town to aid in the building of a school house therein, which petition was read and accepted and placed on the files of said Board; and afterwards, on the same day and year last aforesaid, the Board of Trustees of said town did, in pursuance of said petition, adopt an ordinance and enter the same on the records of said town, directing that there should be made and issued to the School Trustees of Monticello, White County, Indiana, twenty thousand dollars of coupon bonds of said town of the denomination of one hundred dollars each, with interest at the rate of ten per centum per annum, payable annually; and afterwards, to-wit, on the 1st day of May, 1869, the said town made, executed, and issued its coupon bonds under said order to the amount of twenty thousand dollars, maturing in ten years from the date thereof, which bonds were sold and delivered to certain persons, who became purchasers, holders and owners thereof; which said bonds so issued are yet now outstanding and unpaid obligations of said town in the hands of the holders and owners thereof as aforesaid, as to the principal sum thereof, and are and were the only indebtedness of said town.

And afterwards, to-wit, on the 11th day of May, 1878, a petition was presented to the Trustees of said town of Monticello by the owners of taxable property therein, which petition (omitting the names of the signers thereto) is in the words and figures following, to-wit:

"We, the undersigned, citizens of the town of Monticello, Indiana, and owners of the taxable property therein, respectfully petition that you, as Trustees of said town, contract a loan for said town, for the purpose of paying the indebtedness thereof, in the sum of twenty-one thousand dollars."

(Signed)
May 11, 1878. (names.)

And afterwards, to-wit, on the same day and year last aforesaid, the Board of Trustees of said town entered into their record the following ordinance:

"Be it ordained by the Board of Trustees of the town of Monticello, Indiana, that said town issue bonds in the sum of twenty-thousand dollars, in denomination of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town.

"And be it further ordained, That when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the Board of Trustees, for negotiation and sale.

"And be it further ordained, That said bonds shall not be sold at a price less than ninety-four cents on the dollar."

And afterwards, to-wit, on the 20th day of May, 1878, there were made and issued by the Board of Trustees of said town the coupon bonds of said town to the amount of twenty-one thousand dollars, bearing interest at the rate of seven per centum per annum, payable anually, and maturing, as to principal, in ten years after the date thereof, which said last-described bonds and coupons so made as aforesaid were issued and entitled "Funding bond of the town of Monticello," described as being issued "for the purpose of funding the indebtedness of said town," as appears upon the face and in the body of said bonds, and which last-named bonds and coupons were and are the same bonds and coupons described in the complaint and sued upon by the plaintiff in this action, which said bonds, when so issued, were delivered to J. C. Wilson, aforesaid, under the ordinance aforesaid, who negotiated and sold the same upon his own account and converted the proceeds of the same to his own use. The said town of Monticello, the defendant, did not receive any of the proceeds thereof.

And this defendant further says that on the 20th day of May, 1878, there was no law of said State of Indiana which authorized the Trustees of an incorporated town of said State to issue bonds of the town for the purpose of funding its indebtedness, and there was no law of said State at said date last aforesaid authorizing such incorporated town to issue its bonds for negotiation and sale for the purpose of paying its indebtedness, or for the purpose of raising money to pay its indebtedness.

And this defendant further says that it is and was at the date last aforesaid, an incorporated town of the State of Indiana, organized under the general law of said State for the incorporation of towns having a population of twelve hundred inhabitants. Wherefore, the defendant says, that the said bonds and coupons sued on were issued without any authority of law whatever and are utterly null and void.

D. Turpie,
W. E. Uhl,
Def't's Attorneys.

General Gresham, while District Judge, sitting as the Circuit Court, held the answer good on demurrer. (See *Merrill* v. *Monticello*, 14 F. R. 628.)

III. Reply.

Plaintiff replied by the general denial and a special paragraph, as follows:

REPLY.

At the November term of said court, on the 4th day of November, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the plaintiff, by Roache & Lamme and Harris & Calkins, his attorneys, and files his amended reply to the sixth paragraph of answer herein, in the words following, to-wit:

For a further and fourth amended reply to the sixth paragraph of the defendant's answer, filed February 20th, 1882, plaintiff says—

That he admits the defendant is a municipal corporation organized under the general laws of the State of Indiana for the incorporation of towns, and was such corporation as mentioned in the said answer, and now is. He admits that on May 1st, 1869, under and in pursuance of the Act of March 11th, 1867, the said town issued its bonds in the sum of twenty thousand dollars, due ten years after date and bearing ten per cent. interest, payable semi-annually, for the purpose of building and completing a school-house for and in said town, under the petition and ordinance mentioned in said answer, and accordingly said bonds were then and there sold, and the money received used and applied for the purposes aforesaid.

At the time the said mentioned bonds were issued, the assessed value of all the property in said town for taxation purposes did not exceed, in the aggregate, the sum of four hundred thousand dollars, and for the years 1870, 1871 and 1872, the assessed value did not exceed, for either year, the sum of four hundred thousand dollars, as shown by the assessment and tax duplicates of said town, and the polls for each of said four years did not exceed two hundred in number; that by Section three (3) of said Act of 1867, for the liquidation of the interest and principal of the bonds, the levy for taxation was limited to fifty cents on the one hundred dollars taxable property, and one dollar on each poll.

Plaintiff shows to the Court that on March 3d, 1873, the General Assembly of this State passed an Act to authorize cities and towns to sell bonds, etc., (Acts of 1873, p. 6; 1 Davis 143) in the fourth section whereof the bonds of the said town of Monticello were legalized and made valid. It was further provided by said section four, the levy to pay said taxes and interest thereon should be taxed and levied in accordance with the provisions of said Act, among which was that taxes levied upon the assessed value of the property of said town for the payment of the interest accruing annually, and the principal due, should not in any one year exceed fifty cents on any one hundred dollars of taxable property, and one dollar on each poll. It was further provided in said Act that the treasurer of said town should keep an accurate account of the revenue arising from said special tax, and should apply the same for no other purpose than to the payment of the interest and principal of such bonds.

At the time of the taking effect of said Act the value of property in said town subject to taxation for said purposes, as shown by the assessment and tax duplicate, did not exceed the sum of four hundred thousand dollars as aforesaid, and that for the years 1874, 1875, 1876, 1877, 1878, and 1879, the assessed value of the taxable property of said town, for the purposes aforesaid, as shown by the records, assessment rolls and tax duplicates as aforesaid, did not aggregate for any of said years the sum of five hundred thousand dollars, and the taxable polls for each and every of said years was less than two hundred.

Plaintiff further shows that said town, during the years from 1869 to 1878, both inclusive, levied a special tax for each year for the purpose of liquidating said bonds, but that the whole of the taxes collected for that purpose was consumed each and every year in keeping down and paying the interest accruing on the said issue of bonds, and no sum was or could have been at any time set apart as a sinking fund for the liquidation of the said bonds at maturity.

Plaintiff says that after the Legislature, by said Act of March 8th, 1873, limited said taxes as aforesaid, it was impossible for said town to have made provisions, by levy and collection of taxes, to meet and discharge said bonds at maturity.

The plaintiff says that it appearing to said town and the citizens thereof that it would not be able to immediately pay off and discharge said bonds at maturity, to-wit, May 1st, 1879, out of any revenue provided therefor by taxation or otherwise, and in order to prevent defalcation, did, on or about the 11th day of May, 1878, present a petition, as in said answer set forth, asking said town to contract a loan in the sum of $21,000, for the purpose of paying off the indebtedness of said town, namely, the bonds aforesaid.

That in pursuance of said petition the trustees of said town did on said day pass the ordinance in said answer set forth, authorizing and providing for the issuance of its bonds in the sum of twenty-one thousand dollars, in denominations of one hundred dollars each, bearing interest at the rate of seven per cent. per annum, to provide the means with which to pay the old bonds aforesaid, and did appoint J. C. Wilson, a citizen of said town and a member of the Board of Trustees, to negotiate and sell said bonds in the market for and on behalf of said town.

The plaintiff says that it is true, as in said answer alleged, that afterwards, in pursuance of petition of citizen tax-payers and of said ordinance, the said town did, on May 20th, 1878, make and issue twenty-one thousand dollars of bonds of the denomination of one hundred dollars each, bearing interest at the rate of seven per cent. per annum, payable semi-annually, and maturing, as to the principal, in ten years after the date thereof, which bonds were then and there delivered by the said Board of Trustees of said town to said Wilson, as the officer and agent of said town empowered to negotiate and sell the same for it.

Plaintiff says that said Wilson, as the agent of said town, and under and by virtue of the authority aforesaid, took and received said bonds, and negotiated and sold the same in the market at and for the total sum of $19,680.17 cash in hand, and delivered said bonds to the purchasers for and on behalf of the town, and received from the purchasers said sum of money.

And plaintiff denies that said Wilson sold said bonds upon his own account, as in said answer alleged, but, on the contrary, he sold the same as agent of said town.

The plaintiff shows that afterwards, in the month of July, 1878, he purchased one hundred and forty-three of said bonds, being the bonds in suit, in the open market in the city of Boston, and paid cash therefor to the holder, without any notice or knowledge on his part that said Wilson had failed and neglected to account with and pay over the money by him received to the said town.

And the plaintiff further says that the town of Monticello took from the said Wilson, at the time of placing said $21,000 of bonds in his hands for sale, a bond, with security, conditioned for the faithful accounting to said town of the proceeds thereof; that said Wilson absconded and went to Canada before he accounted for the proceeds of said bonds; that at the time he left this State he had on deposit, in cash, in the First National Bank of Monticello, Indiana, in his name as trustee the sum of $6,618.10, part and parcel of the money realized from the sale of said bonds which are now in suit; that the town of Monticello thereupon instituted suit in the proper court of the State of Indiana to recover, and did thereafter recover said sum, to-wit, $6,618.10, from said Wilson and from said bank, which was duly paid to said town; that said town ever since has kept and used said money and appropriated it to its own use; that said town recovered said money in said action against said Wilson and said bank on the ground that said sum was the proceeds of the sale of the very bonds in suit, which had been deposited by said Wilson in said bank to his credit as trustee, and the Supreme Court of Indiana affirmed the judgment of the court below, and the money was thereupon paid to the said town, which has ever since kept, used, and appropriated the same; that before that time and on the 25th day of June, 1880, said town of Monticello, on proper proceedings begun in the proper courts of said State, did recover final judgment against said Wilson on his bond, executed by him for the purposes aforesaid, for the residue of said bonds, to-wit, $15,000, which judgment was appealed from the Jasper Circuit Court to the Supreme Court of the State, when it was reversed and remanded, after which the case was dismissed and wholly discontinued by said town.

Wherefore, said plaintiff says that the said town of Monticello has ratified and affirmed the acts of the said Wilson in the premises, and,

having received from him the proceeds of the said bonds in suit or a part thereof, can not now deny or impeach the action of the said Wilson in the sale thereof or their validity.

ROACHE & LAMME,
HARRIS & CALKINS,
Attorneys for Complainant.

As counsel and the Court felt this was the important *pleading*, a demurrer thereto was fully argued and most carefully considered. Judge Woods held the reply good in an opinion, stating the case fully.

Merrill v. *Monticello*, 22 F. R. 589.

In the meantime General Gresham had become Circuit Judge, and the case was tried before both Judges sitting as the Circuit Court, under written stipulation, waiving a jury. At the close of the trial the Circuit Judge adhered to his original opinion, while Judge Woods adhered to his own views; and although the reply was proved, judgment was given in favor of the defendant, the Circuit Judge controlling the case. Plaintiff was so embarrassed by the cross-rulings that the Court, deeming it a special hardship to rule the law one way on demurrer and another on the trial, set the judgment aside, to the end that a special finding of facts might be made on which this Court could reach the merits of the case. (Transcript, p. 26 fol. 53.) On April 26, 1887, the case was again tried by the Court under the stipulation, waiving a jury, Judge Woods presiding, who, at the request of Merrill, made the following

IV. SPECIAL FINDING OF FACTS.

Upon request of plaintiff in the above entitled cause the Court makes a special finding of the facts as follows:

1st. At the time hereinafter mentioned the defendant was a municipal corporation organized and existing under and by virtue of the laws of the State of Indiana, and situate in the county of White, in the said State.

2d. That upon the 24th day of January, 1869, a petition was presented to the Board of Trustees of said town by the School Trustees thereof, praying for the issue of bonds of said town to aid in the building of a school-house in said town, which said petition was granted, and in pursuance thereof, the Trustees of said town did pass and adopt an ordinance directing that there should be made and issued to the said School Trustees of said town twenty thousand dollars of coupon bonds of said town of the denom-

ination of one hundred dollars each, with interest at the rate of ten per cent. per annum, payable annually; and afterwards, to-wit, on the 1st day of May, 1869, the said town executed the said bonds under said ordinance to the amount of $20,000, maturing in ten years after the date thereof, which bonds were sold and delivered to certain persons, who then and there became the purchasers thereof, and which bonds, at the time hereinafter mentioned, were outstanding, unpaid, and valid obligations of said town.

3d. On the 11th day of May, 1878, a petition was presented to the Board of Trustees of the defendant, signed by citizens, owners of taxable property in said town, praying for the issue of bonds of said town to the amount of $21,000, which petition (omitting the names of the signers thereto) is in the words following, to-wit:

"We, the undersigned, citizens of the town of Monticello, Indiana, and owners of the taxable property therein, respectfully petition that you, as Trustees of said town, contract a loan for said town for the purpose of paying the indebtedness thereof in the sum of twenty-one thousand dollars."

May 11th, 1878. (Signed names.)

That thereupon the Board of Trustees of the defendant passed and entered of record the following ordinance, to-wit:

"Be it ordained by the Board of Trustees of the town of Monticello, Indiana, That said town issue bonds in the sum of twenty-one thousand dollars in denomination of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town. And be it further ordained, that when said bonds are issued, they be placed in the hands of J. C. Wilson, a member of the Board of Trustees, for negotiation and sale. And be it further ordained, that said bonds shall not be sold at a price less than ninety-four cents on the dollar."

4th. That on the 20th day of May, 1878, in pursuance of the said petition and ordinance, the said defendant town made and executed its 210 coupon bonds, payable to bearer, of the denomination of $100 each, bearing interest at the rate of seven per centum per annum, which bonds and coupons are in the words and figures following, to-wit:

"No. 1. UNITED STATES OF AMERICA. $100.

"STATE OF INDIANA.

"*Funding Bond of the Town of Monticello.*

"Ten years after date the town of Monticello, in the county of White, State of Indiana, promises to pay to bearer, at the Importers' and Traders' National Bank, New York, one hundred dollars in gold, with interest thereon at the rate of seven per centum per annum, payable an-

nually, in gold, at the same place, upon presentation of the proper coupon hereto attached, without any relief whatever from valuation or appraisement laws of the State of Indiana. The principal of this bond shall be due and payable, at the option of the holder, on the non-payment, after due presentation of any of said coupons for ninety days after the maturity thereof. This bond is one of a series of $21,000 authorized by the said town by an ordinance passed by the Board of Trustees thereof on the 13th day of May, 1878, for the purpose of funding the indebtedness of the said town.

"In witness whereof, the Board of Trustees of the town of Monticello have caused this bond and the coupons thereof to be signed by their president and clerk and the seal of the town to be affixed hereto, at the said town of Monticello, this twentieth day of May, 1878.

"R. W. CHRISTY, *President.*

"Attest: F. BOSINGER, *Clerk.*"

(*Copy of Coupon.*)

"The town of Monticello, Indiana, will pay the bearer, in gold coin, seven dollars, without relief from valuation or appraisement laws of the State of Indiana, at the Importers' and Traders' National Bank, New York, on the twentieth day of May, 1880, being one year's interest on bond No. 1.

"R. W. CHRISTY, *President.*

"Attest: F. BOSINGER, *Clerk.*"

5th. That the said bonds were put in the hands of the said J. C. Wilson, in pursuance of said ordinance, for sale, and that $14,300 of the said bonds, being the same as those now in suit, were sold to Claypool & Stoddard, of Indianapolis, Indiana, for which the said firm of Claypool & Stoddard paid to the said Wilson the sum of $12.918.40, which said last-named sum was paid to the said Wilson in the following manner: On or about April 14, 1879, said Claypool & Stoddard, by the direction of said Wilson, paid a draft, drawn by G. A. Ivers, of Chicago, for $6,000; on same day said Claypool & Stoddard paid said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $5,000; that on the 13th day of May, 1879, the said Claypool & Stoddard paid to said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $1,840.30, and within a few days after the last-named date said Claypool & Stoddard, for the balance of the said sum of $12,918 40, paid to him the sum of $78.17.

6th. That the Board of Trustees of said town required and exacted from their said agent, J. C. Wilson, a bond, with sureties, to secure the money which he might realize from the sale of said bonds.

7th. That the said Wilson, after the sale of said bonds, failed to turn over the proceeds thereof to the Treasurer of the said town and fled the country.

8th. That at the time the said Wilson fled the country he had a large sum of money on deposit in the First National Bank of Monticello, Indiana, to his credit as "trustee;" that suit was instituted by the defendant town against said bank to recover the same, upon the ground that such money was the proceeds of the sale of said bonds so made by the said Wilson; that judgment was rendered in favor of said town against said bank for the sum of $6,988.43; that thereupon the receiver of the said bank appealed to the Supreme Court of Indiana, and thereupon said judgment was affirmed by said Supreme Court (*Bundy, receiver, etc.*, v. *Town of Monticello*, 84 Ind. 119), and said town recovered the sum of $6,988.43.

9th. That the said town instituted a proceeding upon the bond so given by the said Wilson to the said town to secure the money which he might realize from the sale of said bonds, and in a court of competent jurisdiction recovered judgment against the sureties and the said Wilson, on the said bond, for the full amount of the proceeds arising from the sale of said bonds, and from which judgment an appeal was taken to the Supreme Court of Indiana, and reported in 85 Indiana Reports, at page 10, and which said judgment was reversed and remanded by said Supreme Court for another trial; and afterwards the said suit was dismissed by the said town, and that the said town has received nothing on account of said bond.

10th. That at the time of the issuing of the bonds in suit there was in the town treasury $3,047.85, and no more, received under the taxing act of the Legislature of Indiana, under which the bonds were issued as a special fund for the payment of the $20,000 ten per cent. bonds then outstanding, and that under the laws of the State of Indiana a sum sufficient to pay said bonds could not have been raised before maturity of the same on the amount of taxable property in said town.

11th. That the plaintiff is a resident of Newton, in the State of Massachusetts, and that he bought the bonds in suit in open market, in the city of Boston, as an investment, and paid therefor a valuable consideration, without any notice of any irregularity as to their issue, or any claim to that effect.

And the Court further finds that the principal of the bonds sued on is wholly unpaid, and that the interest upon the same accrued is wholly unpaid from the 20th day of May, 1880.

And the Court further finds, as a conclusion of law upon the foregoing facts, for the defendant.

And the plaintiff, Abner L. Merrill, objects and excepts to the conclusion of law so stated by the Court upon said findings.

WM. A. WOODS, *U. S. Judge.*

V. Statutes of Indiana.

The following is a compilation of the Statutes applicable to this case:

1. In 1852 the Statutes of Indiana were revised by legislative authority. On June 11, 1852, an Act was passed, entitled:

"An Act for the incorporation of towns, and defining their powers, providing for the election of the officers thereof, and declaring their duties. (Vol. 1, R. S. 1852, p. 482, known as the Town Act) Section 27 of said Act is as follows:

"Sec. 27. No incorporated town under this Act shall have power to borrow money or incur any debt or liability, unless the citizen-owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the Board of Trustees to contract such debt or loan; and such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same; and for any debt created thereby, the Trustees shall add to the tax duplicate of each year successively, a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof." (p. 488.)

Now Section 3342, R. S. 1881.

No power was given by this Act to Town Trustees to build schoolhouses as will appear in argument.

2. On March 11, 1867, the General Assembly passed an Act entitled:

"An Act to authorize cities and towns to negotiate and sell bonds, to procure means with which to erect and complete unfinished schoolbuildings, and pay debts contracted for erection of such buildings, and authorizing the levy and collection of an additional special school tax for the payment of principal and interest of such bonds." (Acts Reg. Ses. 1867, p. 24.)

Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That any city or incorporated town in this State, which shall, by the action of its School Trustee or Trustees, have commenced, or may hereafter commence, the erection of any building or buildings for school purposes, or which shall have by its School Trustee or Trustees contracted any debts for the erection of any such building or buildings, and such Trustee or Trustees shall not have the necessary means with which to

complete such building or buildings, or pay such debt, may, on the filing by the School Trustee or Trustees of said city or incorporated town of a report, under oath, with the Common Council of such city or the Board of Trustees of such incorporated town, showing the estimated cost of any such building or buildings, or the amount required to complete such building or buildings, or the amount of such debt, on the passage of an ordinance authorizing the same by the Common Council of such city or the Board of Trustees of such incorporated town, issue the bonds of such city or town to an amount not exceeding in the aggregate thirty thousand dollars, in denominations not less than one hundred nor more than one thousand dollars, and payable at any place that may be designated in such bonds, the principal in not less than one year nor more than twenty years after the date of such bonds, and the interest annually or semi-annually, as may be therein provided, to provide the means with which to complete such building or buildings and to pay such debt; and such Common Council or Board of Trustees may, from time to time, negotiate and sell as many of such bonds as may be necessary for such purpose, in any place, and for the best price that can be obtained therefor in cash: *Provided*, That such bonds shall not be sold at a price less than ninety-four cents on the dollar.

SEC. 2. The proceeds of the sales of such bonds shall be paid to the said School Trustee or Trustees, to enable them to erect or complete such building or buildings and pay such debt; but before payment to them, such School Trustee shall file with the County Auditor a bond, payable to the State of Indiana, in a sum not less than the full amount of the said money so to be paid to them, and with security to be approved by said Auditor, conditioned for the faithful and honest application of such money to the purpose for which the same was provided; and such Trustee or Trustees, and their surety or sureties, shall be liable to suit on such bond for any waste, misapplication or loss of such money, in the same manner as now provided for waste or loss of school revenue.

SEC. 3. In addition to the levying the tax by cities or incorporated towns for general purposes, now authorized by law, the Common Council of any such cities and the Board of Trustees of any such incorporated towns as shall avail themselves of the provisions of this act, are hereby authorized and required to levy annually a special additional tax at the same time and in the same manner as other taxes of such city or town are levied, sufficient to pay the interest and principal of said bonds falling due, which additional special tax shall be collected as other taxes of such city or town are collected; and the Treasurer of such city or town shall keep accurate accounts of the revenue arising from such special tax, and shall in his reports, and when required by the city or town authorities, show the amount thereof received, the amount disbursed, and the amount thereof, if any, remaining delinquent; he shall pay out the same only by the authority of the Common Council of such city, or Board of Trustees of such town, and shall permit the same to be applied to no other pur-

pose than the payment of the principal and interest of such bonds; and official bonds of City and Town Treasurers shall be construed to cover and include revenue arising from this source: *Provided, always*, That the additional special tax hereby authorized shall not, in any one year, exceed fifty cents on each one hundred dollars of taxable property, and one dollar on each poll.

On May 15, 1869 (Acts Reg. and Spec. Ses. 1869, p. 31 of Spec. Ses.) Section 1 of the Act of 1867 was amended so as to read as follows:

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That Section 1 of the above named Act be, and the same is hereby, amended so as to read as follows:

SECTION 1. That any city or incorporated town in this State, which shall, by the action of its School Trustee or Trustees, have purchased any ground and building or buildings, or may hereafter purchase any ground and building or buildings, or have commenced or may hereafter commence the erection of any building or buildings for school purposes, or which shall have, by its School Trustee or Trustees, contracted any debts for the erection of such building or buildings, or the purchase of such ground and building or buildings, and such Trustee or Trustees shall not have the necessary means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, or pay such a debt, may, on the filing by the School Trustee or Trustees of said city or incorporated town, of a report under oath, with the Common Council of such city, or the Board of Trustees of such incorporated towns, showing the estimated or actual cost of any such ground and building, or buildings, or the amount required to complete such building or buildings, or purchase such ground and buildings, or buildings, or the amount of such debt, on the passage of an ordinance authorizing the same, by the Common Council of said city, or the Board of Trustees of such incorporated town, issue bonds of such city or town to an amount not exceeding in the aggregate thirty thousand dollars, in denominations not less than one hundred dollars nor more than one thousand dollars, payable at any place that may be designated in the bonds, the principal in not less than one year nor more than twenty years after the date of such bonds, and the interest annully or semi-annually, as may be therein provided, to provide the means with which to complete such building or buildings, or to pay for the purchase of such ground and building, or buildings, and to pay such debt; and such Common Council, or Board of Trustees may, from time to time, negotiate and sell as many of such bonds as may be necessary for such purpose in any place, and for the best price that can be obtained therefor in cash: *Provided*, That such bonds shall not be sold at a price less than ninety-four cents on the dollar.

On March 8, 1873 (Acts 1873, p. 60), the General Assembly passed another Act, entitled "An Act to authorize cities and towns to negotiate and sell bonds to procure means with which to erect and complete unfinished school buildings, and to purchase any ground and building for school purposes, and to pay debts contracted for such erection and completion, and purchase of buildings and grounds, and authorizing the levy and collection of an additional special school tax for the payment of such bonds."

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That any city or incorporated town in the State which shall, by the action of its School Trustee or Trustees, have purchased any ground and building or buildings, or may hereafter purchase any ground and building or buildings, or have commenced or may hereafter commence the erection of any building or buildings for school purposes, or which shall have, by its School Trustee or Trustees, contracted any debts for the erection of such building or buildings, or the purchase of such ground and building or buildings, and such Trustee or Trustees shall not have the necessary means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, or to pay such debt, may, on the filing, by the School Trustee or Trustees of said city or incorporated town, of a report under oath with the Common Council of said city, or the Board of Trustees of such incorporated town, showing the estimated or actual cost of any such ground and building or buildings, or the amount required to complete such building or buildings, or purchase such ground and building or buildings, or the amount of such debt, on the passage of an ordinance authorizing the same by the Common Council of said city, or the Board of Trustees of such incorporated town, issue the bonds of such city or town to an amount not exceeding, in the aggregate, *fifty* thousand dollars, in denominations not less than one hundred nor more than one thousand dollars, and payable at any place that may be designated in the bonds, the principal in not less than one year nor more than twenty years after the date of such bonds, and the interest annually or semi-annually, as may be therein provided; to provide the means with which to complete such building or buildings, or to pay for the purchase of such ground and buildings, and to pay such debt; and such Common Council and Board of Trustees may from time to time negotiate and sell as many of such bonds as may be necessary for such purpose, in any place and for the best price that can be obtained therefor in cash: *Provided*, That such bonds shall not be sold at a price less than ninety-four cents on the dollar.

SEC. 2. The proceeds of the sales of such bonds shall be paid to the said School Trustee or Trustees, to enable them to erect or complete such building or buildings, and pay such debt; but before payment to them, such School Trustees shall file with the County Auditor a bond payable to

the State of Indiana in a sum not less than the full amount of the said money so to be paid to them, and with security to be approved by said Auditor, conditioned for the faithful and honest application of such money to the purpose for which the same was provided; and such Trustee or Trustees, and their surety or sureties, shall be liable to suit on such bond for any waste, misapplication, or loss, of such money in the same manner as now provided for waste or loss of school revenue.

SEC. 3. In addition to the levying the tax by cities or incorporated towns for general purposes now authorized by law, the Common Council of any such cities and Board of Trustees of any such incorporated towns, as shall avail themselves of the provisions of this act, are hereby authorized and required to levy annually a special additional tax at the same time and in the same manner as other taxes of such city or town are levied, sufficient to pay the interest and principal of said bonds falling due, which additional special tax shall be assessed and collected *as the taxes for State and County revenue are assessed and collected;* and the Treasurer of such city or town shall keep accurate accounts of the revenue arising from such special tax, and shall, in his reports, when required by the city or town authorities, show the amount thereof received, the amount disbursed, and the amount thereof, if any, remaining delinquent; he shall pay out the same only by the authority of the Common Council of such city, or Board of Trustees of such town, and shall permit the same to be applied to no other purpose than the payment of the principal and interest of such bonds; and official bonds of city and town Treasurers shall be construed to cover and include revenue arising from this source. Persons residing outside of any such city or town, and electing to be transferred to such town or city for educational purposes, or who shall send their children to the school taught in any such building, shall, with their property, be liable to such tax as if they resided in such city or town, on all property owned by said person in the township where such city or town is located; *provided always, that nothing in this Act shall be construed to prevent the School Trustee or Trustees of such town or city from admitting pupils into such schools from outside such city or town, in their discretion, upon the payment of tuition therefor, and without subjecting the property of their parents to such taxation, when such schools are not crowded, and their admission shall in no way interfere with the progress of the children within such incorporated city or town; and providing further*, that the additional special tax hereby authorized, shall not in any one year exceed fifty cents on each one hundred dollars of taxable property, and one dollar on each poll.

SEC. 4. All bonds issued, contracts made, and debts created pursuant to the Acts of March 11, 1867, and May 15, 1869, relating to the same subject as this Act, are hereby legalized and declared valid, and the taxes to pay any such bonds, contracts or debts, and the interest thereon, shall be assessed and collected in accordance with this Act.

SEC. 5. An emergency existing for the immediate taking effect of this Act, it shall be in force from and after its passage.

Section 3 was not engrossed correctly and had to be re-enacted in 1875 (Acts 1875, p. 29.) The italics show the additions inserted in 1875. The Act is compiled as Sections 4488, 4489, 4490, R. S. 1881.

VI. Assignment of Errors.

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1890.

No. 125.

ABNER L. MERRILL, Plaintiff in Error,

vs.

TOWN OF MONTICELLO, Defendant in Error.

Of October Term, in the Year of our Lord One Thousand Eight Hundred and Ninety.

Comes now Abner L. Merrill, plaintiff in error, by Addison C. Harris, his attorney, and says that in the record and proceedings aforesaid, there is manifest error in this, to wit:

That the Circuit Court of the United States, for the District of Indiana (in the Seventh Circuit), erred in holding upon the special finding of facts made upon the trial of said cause, that the law was with the defendant, and in awarding judgment accordingly against this plaintiff in error; whereas, upon the facts so found, judgment should have been awarded in favor of the plaintiff. And the said Abner L. Merrill prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught; and that he may be restored to all things which he hath lost by occasion of said judgment, and that said Circuit Court may be ordered and directed, upon the facts so found, to award and enter judgment in favor of this plaintiff.

ADDISON C. HARRIS,
Attorney for Plaintiff in Error.

ARGUMENT.

No question arises on the pleadings.

The case seems to resolve itself into two principal questions:

1. Whether the town of Monticello had the power to borrow money to meet its outstanding bonds, about to mature, and which it was otherwise impotent to pay by reason of the legislative restriction on its taxing power.

2. Whether, after selling the bonds, and the receipt of the purchase-money by its authorized agent, and after his defalcation, the recovery by the town of a part of the fund and suit on the agent's bond for the remainder, the town can now be heard to say the issue was *ultra vires*.

We shall waste no words to meet any technical objections that may be suggested, as they have all long since been put at rest by the decisions of this Court.

In the *Town of East Lincoln* v. *Davenport*, 94, U. S., 801, it is said:

> "The case shows that the plaintiff below was the bona fide owner of the coupons sued on. Questions of form merely, or irregularity, or fraud, or misconduct on the part of the agents of the town, can not, therefore, be considered. * * *
>
> "There must be authority in the town to issue the bonds by the Statutes of the State. If this can not be found the holder must fail; if it exists he is entitled to recover."

The following cases illustrate the rule as to every objection likely to be made in this case:

Van Hostrup v. *Madison City*, 1 Wal. 291;
Meyer v. *City of Muscatine*, 1 Wal. 393;
Grand Chute v. *Winegar* 15 Wal. 356;
Town of Coloma v. *Eaves*, 92 U. S. 484;
Marcy v. *Township of Oswego*, 92 U. S. 638;
Town of Venice v. *Murdock*, 92 U. S. 494;
Township of Rock Creek v. *Strong*, 96 U. S. 271;
Brooklyn v. *Ins. Co.*, 99 U. S. 370;

Walnut v. *Wade*, 103 U. S. 695;
Bissell v. *City of Jeffersonville*, 24 How. 300;
City of Logansport, v. *Dykeman*, 116 Ind. 20.

Neither the petition, ordinance or bond, refer to any particular Statute, as authority.

The omission to recite, or an erroneous recital of a Statute in a municipal bond, does not impair its integrity, where a law, in force at the time, authorizes municipal bonds for the purposes intended.

Johnson County v. *January*, 94 U. S. 202;
Anderson County Com'rs v. *Beal*, 113 U. S. 238.

The power to issue bonds may be either express or implied.

I. As to the Implied Power.

In *Police Jury* v. *Britton*, 15 Wal. 566; (a case much relied on by defendant), it is said:

"We do not mean to be understood that it requires in all cases express power for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus it has been held that the power to borrow money implies the power to issue the ordinary securities for its repayment, whether in the form of notes or bonds, payable in the future." (p. 572.)

See also,

Seybert v. *City of Pittsburg*, 1 Wal. 272;
Rogers v. *Burlington*, 3 Wal. 666;
City of Savannah v. *Kelly*, 108 U. S. 190.

The question then is, whether in this case, this town had power to borrow money to meet its maturing bonds, which under the circumstances, by reason of legislative limitation on its taxing power, it was otherwise impotent to discharge. To answer this question, recourse must be had to the Statutes and adjudications of Indiana.

Clairborne County v. *Brooks*, 111 U. S. 400.

The town of Monticello resisted the first issue of bonds on the ground that the school-house was erected beyond the limits of the

town, and that Section 4 of the legalizing Act was void. The Supreme Court put down these contentions, holding that the legalizing Act was valid, and that school-house bonds were not *ultra vires* and void merely because such school-house is not within the corporate limits of such town.

Gardner v. *Haney*, 86 Ind. 17.

The new Constitution took effect in 1851. Section 1, Article VIII, declares:

"It shall be the duty of the General Assembly * * * to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to all."

Other provisions of the same Article merged the various educational funds of the State into a single perpetual school fund, to be increased, but never to be "diminished; and the income thereof shall be inviolably appropriated to the support of common schools, and to no other purpose whatever."

So that the Legislature was required to make provision for the erection and maintenance of school-houses. The adoption of the new Constitution made necessary a general revision of the laws; and this was done in 1852. Another provision of the Constitution declared that every law should relate to but one subject, and matters properly connected therewith. So that it became necessary to pass one law concerning the government of towns, another for cities, another for schools. The town Act of 1852 (1 R. S. 1852, p. 482) does not mention schools. It invests towns with certain enumerated powers (Sec. 22) of a police nature, with authority to levy taxes for such town purposes. Section 24 following declares:

"All money, however derived, belonging to such corporation, shall only be appropriated for such objects and defraying such expenses as accrue or necessarily arise in the exercise of powers granted by this Act."

Then follows Section 27, set out *supra*, and also in Judge Gresham's opinion (14 F. R. 628), and by Judge Woods (22 F. R. 591.) Necessarily this section must be held to be merely a limitation on the powers conferred on towns by the previous section; and so

Judge Woods held, on the authority of *Pratt* v. *Luther*, 45 Ind. 257, wherein it is said—

"It (Section 27) is subsequent to the one which defines the powers and prescribes the duties of the Board of Trustees, and is to be regarded as a limitation upon the powers previously granted."

The whole matter of the erection of school-houses, and the conduct and government of schools, was provided for by the Common School law (1 R. S. 1852, p. 439.) That Act created every civil township (Section 4) and every incorporated city and incorporated town (Sec. 32) into separate legal, corporate entities for school purposes, which are known and distinguished as school corporations, of the name of the municipal corporations, and must contract, sue and be sued, not as the civil or municipal body, but as the school corporation. The boundaries of the school corporations are always identical with the municipal corporations, so that the citizens of each municipal corporation are likewise citizens of the school corporation, and the municipal trustees and officers were made *ex-officio* trustees of the school corporation. It became necessary, by reason of certain decisions, not material here, to re-write the School Law in 1855 (Acts 1855, p. 161), and again in 1865, (Acts 1865, p. 1.) Throughout, the distinction has always been maintained, giving municipal corporations control only of what may be termed municipal affairs, and the school corporations sole control of school affairs. The officers acting for the municipality could not, in that capacity, contract for, sue or be sued, or levy taxes, for the school corporation, and *vice versa*.

Utica Township v. *Miller*, 62 Ind. 230.

A public school-house erected by a township, town or city, is not its private property, but "under the Constitution and laws of this State, public school property is held in trust for school purposes, by the persons or corporations authorized for the time being, to control such property."

The School Township of Allen v. *School Township of Macy*, 109 Ind. 559.

As the Legislature creates municipal townships and school townships, municipal towns and school towns, it follows that the law-

making power may dissolve them, or grant new, or withdraw from them old powers, as may seem necessary for the public welfare.

We are now prepared for, and now return to, the main discussion. Upon the common school system being firmly settled, the people in the thriving towns naturally desired to erect new, substantial and commodious school-houses, suited to their present needs, and future growth. To raise the money by an immediate tax, would impose very heavy burdens, in addition to those of that time—the close of the war. Why should the people of these towns not have authority to borrow for this purpose? And as the people of each town were citizens of two corporations, created by the Legislature, having identical boundaries and citizenship, this power might be conferred upon the school corporation or the municipality; but as bonds were to be issued, it is self-apparent that it was a wise provision to confer this power for this purpose upon the municipality, rather than the school corporation, as it was necessarily contemplated that the bonds would find a market without the State, and a bond issued by the school corporation would not sell as readily, at least, as a bond issued by a municipality. Therefore it was that the new Act of 1867, for a new purpose, authorized municipal towns to borrow money to erect new school-houses. It is not an amendment to the school law, nor to the town law. It is a distinct Act for a distinct purpose and confers new and distinct powers upon towns, with authority to levy taxes for that purpose, subject to the limit fixed by the proviso. The debt when made became a debt of the municipality; but the municipality had no taxing power to meet it, other than that conferred by the Act.

This distinguishes in a marked way, this case from those where the municipality has the general power to levy taxes without limitation, to meet its obligations, of which *Police Jury* v. *Britton*, is an example.

The Act of 1869 was passed to enlarge the powers, so as to enable the municipalities to borrow money to pay for school-house grounds as well as school-houses. The law was re-written in 1873 to extend the debt limit from $30,000 to $50,000, and to ratify school bonds theretofore issued, as questions no doubt had arisen, as in the case of Monticello, (*Gardner* v. *Haney, supra,*) whether a school-house could be erected outside the town limits, and whether the power to

create the debt must be first given by a petition of the citizens, under Section 27 of the Town Act 1852, etc.

The Supreme Court decided in *Clark* v. *Noblesville*, 44 Ind. p. 83, that Section 27 of the Town Act *supra* did not apply to school-house debts. Manifestly, this is so, as it was a new Act, conferring a new power and providing the ways and means in itself for handling the debt.

Here then we have the Legislature, by Section 4, Act of 1873, authorizing and ratifying this school-house debt, making it the debt of the muncipality. We are thus brought to the inquiry:

Had the town of Monticello power to borrow money in 1878 as a means of meeting its outstanding debt about to mature?

It had not the money in its treasury. It had created the debt lawfully. To put any doubt at rest, the Legislature had so declared by Section 4 of the Act of 1873. It had no ability to raise funds sufficient, by taxation, to meet its debt at maturity. So, that the town was, through no fault of its own, impotent to raise the money by any other means than borrowing. It could not even make a temporary loan for a few days, or months, for it could not meet that in the course of the ordinary time of bank paper. It must, therefore, make a longer loan, or default. There is no Statute expressly inhibiting the town from borrowing money under these circumstances to meet this school-house debt. It can not, of course, repudiate a debt which the Legislature has declared is valid; and so the Court says in *Gardner* v. *Haney*, *supra*. The question is thus brought to this:

Was it the Legislative purpose of the State of Indiana to authorize and ratify the debt, and then, by limiting the power of taxation, compel the town of Monticello to break the very promises the General Assembly had both authorized and ratified? The power conferred to create a debt and to promise payment at a certain time, implies the power to perform that promise at that time. And when the promise can not be performed, otherwise than by borrowing, it necessarily follows that the power is given to borrow to meet the promise. And again, to use the words of this Court, in *Police Jury* v. *Britton*, "the power to borrow money implies the power to issue

the ordinary securities for its repayment, whether in the form of notes or bonds, payable in the future."

Such has always been the rule in Indiana, both under special charters and under the general laws authorizing the incorporation of towns and cities. *Smith* v. *Madison*, 7 Ind. 86 (1855) is the leading case. The Court declared:

"Construction of muncipal charters should be such as to carry into effect every power clearly intended to be conferred on a muncipality, and every power necessarily implied, in order to complete exercise of the powers granted."

Again in 1879, the Court said in *Miller* v. *Dearborn County*, 66 Ind. p. 166:

"It is decided in *Smith* v. *The City of Madison*, 7 Ind. 86, that municipal charters are to be construed 'as to carry into effect every power clearly intended to be conferred, and every power necessary to be implied for the complete exercise of the powers granted.' And in *New England, etc. Co.* v. *Robinson*, 25 Ind. 536, it is decided that 'Corporations, along with the express and substantive powers conferred by their charters, take, by implication, all the reasonable modes of executing such powers, which a natural person may adopt in the exercise of similar powers.' See *The City of LaFayette* v. *Cox*, 5 Ind. 38; *Kyle* v. *Malin*, 8 Ind. 34; *The Board* v. *Day*, 19 Ind. 450; *Haag* v. *The Board, etc.*, 60 Ind. 511; *House* v. *The Board, etc.*, 60 Ind. 580; *The Second National Bank* v. *The Town of Danville*, 60 Ind. 504; *The Board* v. *Saunders*, 17 Ind. 437. * * * It is a power incident to corporations to borrow money to meet a debt, when necessary and proper. *Ang.* v. *Ames*, Corp. Sec. 257; *The Board* v. *Day*, 19 Ind. 450."

Again, in 1885, in *Platter* v. *Elkhart County*, 103 Ind. 370, the Court says:

"Corporations, along with the express and substantive powers conferred by their charters, take, by implication, all the reasonable modes of executing such powers which a natural person may adopt in the exercise of similar powers."

And in *Thompson* v. *City of Peru*, 29 Ind. 306, the Court said:

"The issuing and sale of bonds in the market, is the most usual and ordinary method adopted by corporations to borrow money."

The case of *Bluffton* v. *Studebaker*, 106 Ind. 129, is an illustration of the Indiana rule. The town of Bluffton was organized under a

special charter, older than the present Constitution, and continues its existence under that charter, subject to the fourth clause of the constitutional schedule, which, in substance, provides that it may so do until the Legislature modifies or repeals its special charter. By the original charter the town was given power, among other things, to buy fire engines. In 1873 the section of the charter conferring powers upon the town, was amended so as to omit the power to buy fire engines. Afterwards the town made a contract for the purchase of fire engines for municipal use. Whereupon certain citizens brought a suit to enjoin the town from making the purchase, on the ground that the power to purchase the fire engines having been once expressly given, and then as expressly taken away, no longer existed. Nevertheless, the Court held that as it was usually an object within the scope of municipal authority to prevent fires, that the town had the implied power, as a means thereto, to purchase the engines. Surely the incidental or implied power of a town to prevent fires is not greater than to pay debts.

Mr. Dillon, in his Treatise on Municipal Corporations, Vol. I, Sec. 119, states the law of this State as follows:

"In Indiana the doctrine is that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt. It is a power incident to corporations, in the absence of positive restriction, to borrow money as means of executing the power."

In *The City of Richmond* v. *McGirr*, 78 Ind. 198, the Court incorporated the foregoing into the body of the opinion as an exactly accurate statement of the law of Indiana, and then added:

"We think the doctrine is well established in this State, that corporations possess all the necessary incidental powers to carry into full operation all their expressly granted powers, and for such purposes may legally execute commercial paper, such as negotiable bonds, in the absence of any restriction in their charter or fraud in the parties."

So that, whatever may be the law of any other Court, we confidently submit that by the law of Indiana, a town having a debt about maturing, which it is wholly unable to meet, without any fault of its own, and because the taxing power conferred has proved to be insufficient to enable it to accumulate a fund sufficient to pay the debt, may borrow money to protect its credit and perform its

obligation, and may issue new bonds for the purpose of borrowing the money. It is not believed that this rule conflicts with any decision of this Court. If it were thought to be so, the Court in this case would follow the settled judicial policy of the State of Indiana under *Clairborne County* v. *Brooks,* 111 U. S. 400, where it is said,

> "It is undoubtedly a question of local policy with each State what shall be the extent and character of the power which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authorative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the State." (p. 410.)

Mr. Turpie felt the full force of this position, as shown by his own words, copied by Judge Woods. (22 F. R. 592.) Mr. Turpie said:

> "It (town) had an express power under Section 27 to contract a loan, and the implied power hence, to issue a bond to the lender; it had the implied power to issue new bonds in lieu of the old ones to the holders of the old bonds upon such time and terms as might be agreed upon between the town and the holders of the old bonds. Hence there was no imperative necessity to issue bonds generally, for sale upon the market."

To this there are many answers:

1. This was not the way the town had promised to take up the old bonds, nor the way the State, in ratifying the bonds, had impliedly declared they should be met and discharged. If the old bondholders and the town could not agree upon the "time and terms," then the town must go to default.

2. The power to borrow money to meet the old bonds does not necessarily flow from Section 27, but arises by necessary implication from the power given by the Acts of 1867-9-73. The power conceded by counsel to give an old bondholder a new bond, which he may sell to a third person in the market, and thus pay himself, is not different from the power to sell the new bond to a third person to get money to pay the old bondholders. They accomplish the same result and are legal equivalents.

Rogers v. *Burlington,* 3 Wal. 666;
City of Savannah v. *Kelley,* 108 U. S. 190.

It is hardly necessary to say that it has often been decided in Indiana, that municipal boards may appoint a member of the city government "an agent to act for them and in their behalf in the issue and sale of bonds, but the acts when done are not the less the acts of" the municipality.

City of Columbus v. *Hauser*, 63 Ind. 178;
Daily v. *Columbus*, 49 Ind. 169.

This concession of Mr. Turpie, that the town had power to issue the bonds sued on, even to exchange for the old ones, seems to us to carry this case in favor of Merrill. It can not be denied that Wilson was the agent of the town, in putting them in circulation. For, in addition to the finding, it appears, from the case mentioned in the finding (*Bundy, Receiver*, v. *Monticello*, 84 Ind. 119), that the town plead and "admitted * * that Joseph C. Wilson was one of the trustees of the town of Monticello, and a duly authorized agent thereof, and as such agent, did, in April, 1879, sell to Claypool & Stoddard, of Indianapolis, Indiana, $14,300 of the bonds of said town," (p. 122) stating the manner of sale in the very same words as the finding in this case: that on September 25, 1879, the town passed a resolution, and caused it to be served on the Receiver, that moneys found in the bank to the credit of "Joseph C. Wilson, Trustee, were, at the time of the suspension of payment of said bank, and still are, the funds and property of said town" (p. 126), and that the town sued for and recovered thereof $6,988.43. And in the other case mentioned in the finding (*Wilson* v. *Monticello*, 84 Ind. 10), it appears that the town affirmed his acts and sued for the proceeds. His bondsmen urged that the bonds were void, and hence the town was not damaged, and so there could be no recovery. But the Court denied their contention. The case was not reversed on the merits, but for other reasons. The Court said: "The case must be again tried" (p. 21.) And so is the ninth finding.

Why the town elected to dismiss the case, does not appear. Was it to better defend this case? Limitation will not intervene for years to come (R. S. 1881, Secs. 293–4), and the case can be brought again. This voluntary waiver on the part of the town for a time, or forever, to proceed on the bond, can not prejudice the rights of the plaintiff, as to him a waiver is not less than if the town had actually received the remainder of the proceeds.

In addition, the interest coupons were paid for a time.

So, that it being conceded that the town had the power to issue the bonds even for the purpose of exchange, followed by sale, suit for, and collection of part of the proceeds, and voluntary abandonment as to the remainder, and payment of interest, makes the bonds in the hands of a bona fide holder valid.

Supervisors v. *Schenck*, 5 Wal. 772, and cases *supra*;
Redd v. *Supervisors*, 31 Gratt, 685;
Dillon Mun. Corp., Sec. 551 and note;
Burroughs Mun. Securities, Sec. 347.

In *City of Lexington* v. *Butler*, 14 Wal. 296, it is laid down that "the repeated decisions of this Court have established the rule: when a corporation has power, *under any circumstances*, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority." How could Merrill know these very bonds had not been put in circulation by the means admitted by counsel to be authorized?

As to Express Power.

It will be noticed that the Acts, *supra*, and more particularly that of 1873, is intended to help towns having their school-houses already built, as well as those building or desiring to build. Omitting all parts of Section 1, except as to towns already having their houses built, and so much as relates to the mode of issuing, which is no longer material, the law provides:

"That any * * * town * * * which shall have * * * contracted any debts for the erection of such (school) building * * * and * * * shall not have the necessary means with which to * * * pay such debt, may * * * on the passage of an ordinance authorizing the same, issue the bonds of such * * * town to an amount not exceeding in the aggregate $50,000 * * * to pay such debt; and * * * may from time to time negotiate and sell as many of such bonds as may be necessary for such purpose." * * *

When the Legislature passed this Act, it can not be assumed that that body was ignorant of the fact that the prior bonds were out-

standing, and under the limited taxing power would not and could not be met at maturity.

Laws receive a sensible construction so as "not to lead to injustice, oppression or an absurd consequence," *U. S.* v. *Kirby*, 7 Wal. 486; and to avoid placing "the legislative department in the attitude of playing at cross-purposes with itself." *Lindley* v. *Braxton*, 27 Ind. p. 58.

In *County of Kankakee* v. *Ætna Life Ins. Co.*, 106 U. S. 668, the municipality resisted bonds issued in payment of subscription for stock, on the ground that the Legislature intended the county to have merely the power to subscribe stock. In meeting this contention (without admitting it to be true in fact), the Court said:

"Indeed, if the argument be good for anything at all, it results that under the operation of this reservation, the naked power to subscribe for stock remains in the counties, without any authority, and therefore without any obligation to pay for it; for if the power to issue bonds is taken away, so also is the power to pledge the faith of the county for the annual payment of the interest, and the ultimate redemption of the principal—a pledge which means, of course, that payment shall be made out of the revenues of the county derived from taxation. As such a construction of law confesses its own absurdity, it is not necessary to make any formal refutation of it."

It is surely not less absurd when the law ratifies bonds and limits the power of taxation so low that the revenues derivable by that method can not rise to meet the bonds at maturity.

These outstanding bonds represented the debt for the erection of a school-building. The town owed for its school-house. Under the Act of 1867–9, bonds could run no longer than for the period of ten years. This Act extended the period to twenty years. Under these circumstances we submit that a debt for which bonds might be made and sold, comprehends any debts created under the school-house law, whether then evidenced by a builder's contract, or a note given as a voucher, or an obligation issued theretofore and outstanding on account of inability on the part of the town to pay such debt. It can not be supposed for an instant that the Legislature intended to leave this and other towns in like situation, helpless, and to help those who had also built their houses and owed their contractors, material men, and the like. Towns having a

school-house completed and not paid for, whether the debt is evidenced by negotiable or non-negotiable obligations, or even by an overdue account, were clearly, in the minds of the legislators, standing in the same class, viz., owing debts for school-houses already built, and entitled to enjoy the privileges of this Act.

In conclusion we beg to add that this brief is ancillary to the more thorough discussion by Judge Woods, which it is proper to say seems to meet the approval of Mr. Dillon. *Vide* note to Sec. 119, 4th Ed.

Plaintiff in errror prays that the case be reversed with direction to enter judgment in his favor upon the special finding.

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Of Counsel.

INDIANAPOLIS, SEPT. 1, 1890.

U.S. Supreme Court
FILED,
NOV 15 1890
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 125.

ABNER L. MERRILL, PLAINTIFF IN ERROR,

vs.

THE TOWN OF MONTICELLO,
DEFENDANT IN ERROR.

In error to the Circuit Court of the United States for the District of Indiana.

BRIEF FOR DEFENDANT IN ERROR.

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IN THE

United States Supreme Court.

ABNER L. MERRILL

vs.

THE TOWN OF MONTICELLO. } No. 125.

Brief for Defendant in Error.

This is an action upon certain bonds and coupons alleged to have been executed by the defendant, and bought by the plaintiff in open market. The defendant is an incorporated town under the law of Indiana providing generally for the incorporation of towns. It is a town, not a city, having a small population and limited resources. This municipality was in debt in the sum of $20,000.00 by the sale of its bonds for school-house purposes, prior to and at the time of the passage of the pretended ordinance, under which these bonds were issued, which are now sued on. The loan prayed for by the petition of the tax-payers of said town of May, 1878, was doubtless intended to pay this prior indebtedness. But the special findings show that none of the money realized by the sale of the pretended bonds and coupons was paid into the treasury of the town; the same

was wholly converted by one J. C. Wilson to his own use, who fled the country.

The complaint or declaration in the case is found on page 2 to page 8 of printed record. It is founded upon certain bonds and coupons all bearing the same date, to wit: May 20th, 1878, maturing in ten years thereafter, a copy of which is made part of the special finding. See page 32 of printed record. These bonds all purport to be issued under a pretended ordinance of said town of date May 11th, 1878, in pursuance of a petition by the owners of the taxable property in said town, which petition, ordinance and bond may be found on page 32 of the printed transcript of the record on file.

The answer to the complaint is in two paragraphs. The first is the general denial found on page 8 of transcript of record, and amended answer additional to the general denial which is found commencing on the last line of page 10 and running to page 12 of the printed transcript of record. This last paragraph of the answer sets up in full the facts of the prior indebtedness of the town of date May 1st, 1869, upon its bonds then issued for $20,000.00.

Also the petition of the owners of taxable property to the trustees of the town to contract a loan to pay its indebtedness. It also sets up an alleged ordinance of the Board of Trustees of said town in pretended accordance with said petition authorizing the issue, negotiation and sale of the bonds of the town. That said bonds were so issued under said pretended ordinance and were entitled "Funding Bond of the Town of Monticello," and were described upon the face and in the body of said bonds as being issued "for the purpose of funding the indebtedness of said town" of Monticello aforesaid. That the same bonds were afterwards negotiated and sold by one Joseph C. Wilson, who was a member of the Board of Trustees of said town, who converted the proceeds of the same to his own use. That these are the same bonds now sued on.

That there was no law of the State of Indiana which authorized the issue, sale and negotiation of said bonds. That the same were issued without any authority of law whatever, and were and are utterly null and void. Such is the answer in the case. The finding and judgment were for the defendant in error.

PETITION OF THE OWNERS OF TAXABLE PROPERTY IN A TOWN TO CONTRACT A LOAN.

The only law in force in Indiana in May, 1878, authorizing towns to borrow money is section 3342 of the Revised Statutes of Indiana of 1881, and is as follows:

"No incorporated town under this act shall have power to borrow money or incur any debt or liability unless the citizen owners of five-eights of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the Board of Trustees to contract such debt or loan. And such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same. And for any debt created thereby, the Trustees shall add to the tax duplicate, of each year successively, a levy sufficient to pay the annual interest on such debt or loan with an addition of not less than five cents on the hundred dollars, to create a sinking fund for liquidation of the principal thereof."

The above is section 27 of the general act of May 11th, 1852, for the incorporation of towns in the State of Indiana. It is in effect a section of the town charter, under which it is pretended that the bonds sued on were executed. The terms of this section, and the powers granted thereby, have been quite recently construed by this court in the case next below cited:

"Incorporated towns of Indiana in 1878 had no general power to issue negotiable bonds. The general statute of Indiana of June 11th, 1852, and the general statute of May 16th, 1869, if they authorize the issue of bonds at all, only

authorized the issue of the same for special purposes and on certain conditions." * * * * "Defects in the exercise of a power to issue bonds where such power exists, and the issue was authorized by law, may be curable. When the law confers no authority to issue the bonds in question, the mere fact of their issue can not bind the town to pay them, even to a purchaser before maturity and for value." *Hopper* v. *Town of Covington*, 118 U. S. 148. See pp. 149 and 150 of opinion.

Mr. Justice Gray in this case was considering and passing upon the power of a town to issue its bonds under the same section above cited; and it will be seen from the construction he gave of the section, especially by the use of the particle *if*, that he entertained some doubt whether towns could issue bonds at all. The terms of the section do not authorize the issue of any bonds, and if by implication bonds might be issued to the lenders of money or creditors of the town, there is no implication or inference that the town might issue bonds generally for sale upon the market, and the case cited is an express authority against the exercise of any such power by the town, and against the validity of the bonds sued on in this case.

DIFFERENCE BETWEEN PUBLIC AND PRIVATE CORPORATIONS.

Towns are organized only for the purposes of government. They are classed as public corporations; the powers they exercise are primarily political powers, with such others as may be necessarily connected therewith.

Private corporations are organized for gain, usually for the transaction of some kind of business; the powers exercised by this latter class of corporations are necessarily of greater variety than those belonging to municipalities.

It is said by Judge Dillon in his work upon municipal corporations:

"It is a general and undisputed proposition of law, that

"a municipal corporation possesses, and can exercise the "following powers, *and no others:*

"First, those granted in express words. Second, those "necessarily or fairly implied in, or incident to the powers "expressly granted. Third, those essential to the declared "objects and purposes of the corporation, not simply *con-* "*venient* but *indispensable.* Any fair reasonable doubt con- "cerning the existence of a power is resolved by the courts "against the corporation and the power is denied. * * * "All acts beyond the scope of the power granted are void."

Dillon on Municipal Corporations, sec. 55, p. 101, 1st Ed.

"It is a well settled rule of construction of grants by the "legislature to corporations, that only such powers and "rights can be exercised under them as are clearly compre- "hended within the words of the act, or derived therefrom "by necessary implication. * * * Any ambiguity or "doubt arising out of the terms used by the legislature must "be resolved in favor of the public. The principle is so "familiar in the construction of corporate powers that we "need not stop to refer to authority."

Minturn v. *LaRue*, U. S., 23 Howard, 435.

And again the Supreme Court of the United States say in speaking of the same subject: "A municipal corporation can exercise no power which is not in express terms or by *fair* implication, conferred upon it."

Thompson v. *Sea Co.*, U. S., 3d Wallace, 320.

THE DEBT-MAKING POWER OF TOWNS IN INDIANA.

The debt-making section of the act, 1852, the act for the general incorporation of towns, was up to May, 1878, the date of the bonds sued upon, the only grant of power to create indebtedness by incorporated towns in the State of Indiana, and has never been changed except as to one subject, *schools*, which change will be hereinafter noted. This section is No. 27 of the act of 1852, it is section 3342 of the Revised

Statutes, 1881. The same as that hereinbefore set forth. Under this section it is provided that no incorporated town shall have power "to borrow money," or "contract any debt or liability" unless five-eighths of the citizen-owners of taxable property therein shall petition the Board of Trustees to "contract such debt or loan."

The petition in this case as set forth in the special finding at page 28 of printed transcript of record requests the Board of Trustees to "contract a loan." These are the words of the petition. The section of the act cited authorizes the town to "borrow money," upon the condition that the proper parties request the Trustees "to contract a loan."

The Trustees, however, did not pass any ordinance "to contract a loan." What they did was to ordain that the bonds of the town be issued to a certain amount, placed upon the market and sold generally to any buyers. And the bonds sued upon were issued under this ordinance, which we think was entirely unathorized. The town did not have the power to issue its bonds generally and negotiate them in the market unless it be held in the case of a municipal corporation of the most inferior grade that the power "to borrow money" by "contracting a loan," implied the power to issue and sell the bonds of the town generally in the market for that purpose.

The ordinance passed by the Board of Trustees, found on page 28 of printed transcript of record, does not follow the petition, is not in accordance with it, and was a total and absolute departure from the terms and purpose of the petition and from the law; designed without any lawful authority whatever, to throw upon the market the bonds of the town as securities negotiable generally.

The power to make and issue bonds, even when expressly granted does not imply a power to negotiate and sell such bonds.

Starin v. *Gould*, 23 N. Y. 439.
Gould v. *Sterling*, 23 N. Y. 460.

In this last case it is said: "The only authority given "by the act is to borrow upon the bonds of the town. No "express power to sell the bonds is given, and no such "power can be implied. To borrow money and give a bond "or obligation for it, and to sell an obligation for money, "are by no means identical transactions. In the one case "the money and the bond would of course be equal in "amount; in the other they might or might not be equal."

Gould v. *Sterling*, 23 N. Y. 460.

In this New York case express power was given to the town to borrow money upon its bonds. Yet the court refused from this express power to imply a power to sell the bonds. We think that where the power to issue bonds is only implied and not express, as in the Indiana Statute, there is still less reason to *imply* a power to sell them. For to imply a power from a power which is itself implied is a double implication, which no case and no authority can be cited to sustain. Mr. Daniels, in his recent work upon Negotiable Instruments, in speaking of municipal bonds, says: "When they have once been issued into the market "as valid subsisting securities, they may be sold for any "amount by the holder, like any other chattels. But in the "hands of the municipality they are not, *unless so made by* "*statute, the subject of sale.*"

2 Daniels on Negotiable Instruments, (2 ed.) p. 488.

This doctrine of the text is amply supported in the cases cited:

City of Atchison v. *Butcher*, 3 Kan. 104.

Daviess County v. *Howard*, 13 Bush Ky. 102.

The same doctrine has been approved by the Supreme Court of the United States. In the case next below cited it is said by this court: "The implied power to issue the "bonds of a corporation as evidence of a pre-existing debt "to the holder of such indebtedness does not carry with it "or confer the power to issue bonds generally for sale in the

"market, even if there were an existing debt which might "be paid out of the proceeds of such sales."

Police Jury v. *Britton*, U. S., 15 Wallace, 566.

It is said in the case below cited, one in which the inherent or primary powers of corporations municipal are very largely treated of:

"Whether a municipal corporation has power to borrow "money, and issue negotiable securities therefor, depends "upon a true construction of its charter, and the *legislation* "*of the State applicable thereto.*

"It has no incidental or inherent authority under the "usual grant of municipal powers to do so as a means of "discharging its ordinary municipal functions."

Gause v. *Clarksville*, 5 Dillon's Cir. Ct. R., p. 165.

We do not think that the fact that the town afterwards recovered a portion of the money which was realized by a sale of the bonds sued on would establish the validity of the bonds in question, or their legality as causes of action against the town. This is expressly decided in the case last above referred to. "Where bonds of a city are issued without "authority, for money borrowed and actually received by "the city, the remedy against the city is not by an action "on the bonds, but to recover the money so received by it."

Gause v. *Clarksville*, 5 Dillon's Cir. Ct. R., p. 165.

But in the case at bar there is no common count upon money had and received, or of any other kind, in the plaintiff's complaint. The suit is brought only on the bonds, and the only recovery sought is upon the bonds.

These bonds, as such, are not legal obligations of the town, and there ought to be no recovery upon the same.

Section 3333, Revision of 1881, being section 22 of the act of 1852, is a section of the law containing 19 clauses, including the grant of the usual municipal powers to incorporated towns in Indiana. Under the powers of this section, according to the doctrine in *Gause* v. *Clarksville*, the case above cited, the town has no incidental or inherent authority

to issue negotiable bonds or borrow money as a means for the discharge of its ordinary municipal functions.

None of the clauses of section 22 authorized a loan of money by the town on the issuing of its bonds therefor, or in any other manner. The nineteen clauses of this section relate wholly to the improvement of streets and alleys, the planting of shade trees, and such other matters as are usually embraced in the ordinary functions of incorporated towns.

But the power of a municipal corporation to issue bonds and borrow money "depends upon a true construction of its charter, and *upon the legislation of the State applicable thereto.*"

See *Gause* v. *Clarksville, supra.*

Which we propose now to consider.

LEGISLATION OF THE STATE APPLICABLE TO TOWN INCORPORATIONS.

There are only three acts of the Legislature under which towns had at the time the bonds sued on were issued, in May, 1878, the power to issue bonds generally for sale in the market. These acts are substantially one, each subsequent act being supplemental to a former one.

And these three acts all relate, as aforesaid, to one subject, that of *schools.*

The first of these acts is that of March 11th, 1867. See Acts 1867, p. 24. This act authorized the trustees of an incorporated town to issue and sell the bonds of the town to the amount of $30,000.00, at not less than 94 cents on the dollar, to pay debts incurred for the building of schoolhouses. Such issue and sale to be made upon a sworn report of the school trustees of the town, presented to the Trustees of the civil town, showing the existence of such indebtedness for school purposes, and the necessity for such pecuniary aid.

In this act the town Trustees are expressly authorized "from time to time to negotiate and sell such bonds," upon the terms specified therein.

The second of these acts is the act of May 15th, 1869, Special Session, page 31. This act authorizes the issue and sale of the bonds of the town generally upon the same terms and conditions as the act of 1867, above cited, for the purpose of building school-houses and *purchase of school grounds*. This act of 1869 contains in its express language the power "from time to time to negotiate and sell as many "of such bonds as may be necessary for such purpose." See section 1, Acts 1869, p. 32.

The next of these acts is that of March 8, 1873, see Acts of 1873, p. 60. It authorizes the issue and sale of bonds of incorporated towns, for the same purpose, upon the same proceedings, and upon the same terms as the acts of 1867, 1869, above cited, enlarging the amount of issue to $50,000 instead of $30,000. In this act of 1873 the Trustees of the town are in express language empowered "to negotiate and "sell as many of such bonds as may be necessary for such "purpose."

Each of these acts are inscribed in the titles thereof as "an act to authorize cities and towns to *negotiate* and *sell* "bonds, to procure means with which to erect and complete "school buildings," etc.

These acts were all passed prior to May, 1878, and they comprise the "*legislation of the state applicable*" to incorporated towns upon this subject, in the language of the above authority cited from Dillon's Circuit Court Reports. We think this repeated and continuous legislation upon the subject of the negotiation and sale of bonds for school purposes is very clear evidence that the power to make and sell such negotiable bonds was not embraced, or intended to be embraced, in section 27 of the original act under which it is claimed these bonds were issued. For, if the town had the power under the original section 27 of the act of incorporation, there was no reason whatever for the passage of such acts as those cited at all.

The acts of '67, '69 and '73, above cited, conferring the

express power upon towns to sell and negotiate their bonds for school purposes, are conclusive of *two* things: *First*, that such towns had no such power under the general act of incorporation. *Second*, that legislation was necessary to give them such powers. It will be seen that under the 17th clause of section 22 of the original act of incorporation, the Board of Trustees of the town had power "to complete "school-houses now in progress of erection, and to provide "for payment of the same;" "to erect or provide such school-"houses as may be necessary for the use of the town." These powers were *ordinary municipal functions*, in the language of the above authority. But these powers did not in themselves authorize the borrowing of money for such purposes, or the issuing of bonds for such purposes. On the contrary, such ordinary functions must look to the funds raised by taxation or other revenue as a means of their accomplishment. In aid of such ordinary means, and additional thereto, the power to "contract a loan" was given by section 27 of the original act. And in further aid of such powers, the acts of '67, '69, and '73 were passed, authorizing expressly the issue and sale of bonds for certain purposes; because neither under section 22 or 27 of the original act was such power to issue and sell either granted or implied.

This new and additional power to sell and negotiate the bonds of the town is granted only for one purpose, that of schools. It is very clear that the bonds sued on herein were not issued under either of the acts of '67, '69, or '73 in relation to the negotiation and sale of the town bonds for school purposes. Before there could be any issue of bonds for sale under either of these acts, there must be a sworn report of the school trustees of the town as to the existence of a school debt, its character and amount. Such sworn report of the school trustees is the very basis of the proceeding.

There could not be an issue of bonds for negotiation and

sale, under a report of the school trustees once filed and acted upon, until and without a further report showing the existence of a further and additional school debt. This additional school debt might be for another school-house, or other school furniture, or school grounds; but it could not be on account of a prior issue of bonds, made upon a former application by the school trustees, because such old and prior issue of bonds is no longer a school debt. It is taken from the school debt and becomes a part of the general indebtedness of the municipality. When once bonds have been issued for its payment, it is no longer a school debt, and without perjury could not be reported as such.

The history of the paper sued on in the case at bar as shown by the face of the bond itself, the special findings and the ordinance and petition which are a part thereof, show that the old outstanding school debt of the town had already become a part of the general indebtedness of the town, by the issuing of town bonds for its payment as early as 1868.

Having thus become a debt of the town, it was taken entirely out of the operation of the acts of '67, '69 and '73, above cited, which acts relate only to the issue of and sale of town bonds for the payment of school debts—debts "incurred by school trustees," or as another of these statutes has it, by "the action of its school trustees." It is expressly provided that the money raised by a sale of these bonds provided for by the acts of '67, '69 and '73 goes to the school trustees or trustees—not to the town. See 2d section, Act '73, p. 61. But in the case at bar it is apparent that the property owners of the town petitioned on behalf of the town to obtain money to pay the bonds issued in 1868, which, although issued for school purposes, were yet town bonds and part of the indebtedness of the town.

The recital in the bond, on its face, is that it was issued by virtue of "an ordinance passed May 13, 1878." See p. 28 of printed abstract of the record for copy of the

bond. This ordinance is shown by the evidence to have been passed upon the petition of citizen tax-payers.

The school town and civil town in Indiana are separate corporations governed by separate officers, who are called in the one case school trustees or trustees of the school-town, and in the other, town trustees or trustees of the civil town. See *Huntington* v. *Day*, 45 Ind. 7; *Wright* v. *Stockman*, 59 Ind. 65. The procedure for the issue of what are called school bonds, under either of the three acts cited above, which sort of bonds constituted the original debt in this case, must be commenced by a sworn report of the school trustees to the trustees of the civil town. This report is an indispensable initiatory step in such proceeding, but the bonds sued on in this action had no such origin. They purport to be issued under a petition signed by the citizen property owners of the town under section 27 above referred to; and it is clear that no ordinance, in the absence of a statute, could authorize the sale and negotiation of any bonds issued under said section or under any petition filed in pursuance thereof.

THE FACE OF THE BONDS AND ORDINANCE.

These bonds upon their face purport to be "funding bonds" of the town of Monticello. And in the body of the bonds it is recited in express terms that they were issued "to fund the indebtedness of the town of Monticello," and in the text of the ordinance authorizing them, they are directed to be "issued and *sold* to pay the indebtedness of said town." The ordinance being referred to on the face of the bonds, the purchaser and holder, this plaintiff, was bound to take notice of its terms, and so had express notice and knowledge of the *ultra vires* character of the ordinance. The ordinance and the bonds on their face show that they were not issued to creditors of the town as evidence of a loan of money; but that they were bonds issued generally for sale in the market. This was the very thing the town Trustees had no power to do. There was at the time these bonds were issued, in May, 1878, no law of Indiana author-

izing towns to fund their indebtedness, by an issue and sale of bonds for that purpose. The General Assembly passed such a law in 1879, but it did not take effect until August 24, 1879—more than a year after the execution of the bonds sued on.

This law may be found in acts of 1879, p. 87. It expressly authorizes the Trustees of towns to "*negotiate*" the bonds of incorporated towns for the purpose of funding their indebtedness; provides the circumstances under which such funding may occur, and particularly describes the terms of the bonds, rate of interest and discount. This act we think conclusively shows that, prior to that time, towns had not the power to issue and sell bonds to fund their indebtedness. It shows further, that legislation by the state was accounted necessary to grant them that power. A previous exercise of it, before the passage of a law authorizing it, was a nullity.

"Bonds of a municipality, issued before the taking effect "of the law authorizing such issue, are void."

See *State* v. *Little Rock R. R. Co.*, 31 Ark. 701.

We have seen that the corporate powers of a municipality are to be construed *strictly*. It follows that, when a mode particular is prescribed for the exercise of a power, that mode must be followed, and is *exclusive* of all others. The cases cited by the plaintiff are instances where the power "to borrow money" has been granted, generally as in the case of *Evansville R. R. Co.* v. *The City*, 15 Ind. 395, a case cited by the plaintiff. But in the case at bar under section 27 the power "to borrow money" is not given generally. On the contrary, the power to borrow money, even upon a requisite petition of the property owners, is restricted to a particular manner of borrowing. It is only to be exercised upon petition of property owners "*to contract a loan*," and taxes are prescribed and authorized to pay the interest and principal "*on such loan*." Now, a loan is a lending of money. It necessarily includes the existence and action of a borrower

and lender—it necessarily excludes the notion of a buyer and seller, or of a negotiation and sale of the bonds or other securities. When a particular method of exercising any corporate power of a municipality is prescribed by statute, no other can be adopted. All other modes are excluded. The power to borrow money upon certain conditions is here made one of the corporate powers of the town; but it is to be done by "contracting a loan." The mode is thus prescribed. No other can be used.

Anthony v. *Jasper Co.*, 11 Otto, 697, U. S. S. C.

"We have always held that every holder of a municipal bond is chargeable with notice of the provisions of the law by which the issue of the bond was authorized. If there was no law for the issue, there can be no valid bond."

Ogden v. *County of Daviess*, 102 U. S., p 634.

"Where a statute authorizes the creation of a special liability and provides a special way of discharging that liability, the liability and mode of discharge being provided for in the same statute, the mode prescribed is exclusive of all others."

Wells v. *Supervisors*, 102 U. S. 625. See p. 632 of opinion.

Another case cited by plaintiff is that of *New England Insurance Co.* v. *Robinson*, 25th Indiana, p. 536. The Supreme Court of Indiana say, "the issue and sale of bonds "in the market is the most usual and ordinary method "adopted by corporations of borrowing money." But this is said of a private business corporation—not of a municipal body—and it is said of a case where the charter pointed out no particular mode of borrowing money, but left the method to the discretion of the corporation.

In the case at bar only one of the methods of borrowing money is prescribed, that is by "*contracting a loan.*"

In the case of *Thompson* v. *The City of Peru*, 29 Ind. 305, cited by the plaintiff, the power was given to a city "to borrow money." The words of the statute are, "any incorporated city under this act shall have

"power to borrow money," etc. Nothing is said about the mode in which the power shall be exercised. It is not said the money shall be borrowed "by contracting a loan," that taxes shall be imposed to "pay a loan." In the case in argument it is not said merely the town shall be authorized "to borrow money," but the particular method by which the money is to be borrowed, that is by *contracting a loan*, is set out and prescribed. The question in this case is not what may be the "ordinary and usual method" of borrowing money by a business corporation organized for the purpose of private gain; nor is it a question as to by what method a city may borrow money which is empowered by statute to do so without any restriction as to method; but the question is whether, when, by law, a particular method of borrowing money is prescribed, any other than that method may lawfully be followed. Section 27 enacts that towns, under the proceedings therein described, may "borrow money" by "*contracting a loan.*" Now what may be the usual and ordinary method of doing this has no relevancy in the case at bar. What may be the customary method of exercising the power to borrow money, where there is a general grant of power for that purpose—and no mode of borrowing prescribed—has no relevancy herein. The town was only empowered under section 27 to borrow money by "contracting a loan." Did its officers adopt this method? The finding shows that they did not adopt this method—that they adopted another method—in so doing their acts were without the scope of their authority and are consequently void.

To borrow money "by contracting a loan," is not to *fund* an indebtedness, neither does it imply or necessarily carry with it the power to issue bonds for sale generally in the market. The *implied* power of the town, under the express power granted to it to borrow money by "contracting a loan," may perhaps go to the extent of issuing its bonds to the lender of money to the town, but the plaintiff

in this case does not claim to have been a creditor or lender to the town; he claims to have bought of certain parties to whom the bonds issued were sold in the market. Our position is that the town had no power under section 27 to borrow money, by an issue and sale of bonds in the market.

All the cases cited by the appellant, such as the case of *Van Hostrup* v. *Madison City*, *Meyer* v. *City of Muscatine*, *City of Brooklin* v. *Insurance Co.*, and others, go only to the point that where the power exists, the abuse of it, irregularity or fraud in the exercise of it, will not vitiate the bonds issued in the hands of an innocent holder.

The case of the *City of Richmond* v. *McGirr*, 78 Ind. 198, is especially cited and commented upon by the plaintiff. This was a case of a bond given to a creditor of the city as evidence of a debt for the purchase-money of real estate which he had sold to the corporation. The Supreme Court of Indiana says: "While the charter of the City of Richmond (the general law of the State as to cities) contains a limitation on the borrowing of money, it contains no restriction upon the creation of indebtedness." There is nothing in this case applicable to the powers of a town under section 27, which is a part of the general law chartering towns in Indiana. As to the case of the *City of Savannah* v. *Kelly*, 108 U. S. 190, it is a case concerning the guaranty by the city of the bonds of a certain railroad corporation. There is nothing in the facts or law of this case, or in any of the others cited by the plaintiff, to support his position, that towns in Indiana in 1878 under the general law incorporating them could issue bonds for sale and negotiation generally in the market.

THE FINANCIAL INABILITY OF THE TOWN.

The facts concerning the number of taxable polls, and the amount of taxable property in the town, showing its inability to pay its indebtedness upon a former issue of bonds for school purposes, which was about to mature in

1879, do not in any way operate to increase the power of the Board of Trustees over the credit of the town. Those powers were still limited to the borrowing of money by contracting a loan therefor, under section 27 of the act of '52 above recited. Because it may be expedient or convenient to exercise a power not granted by the act of incorporation, is no reason why such power should be exercised without a law authorizing it.

THE SALE OF THE BONDS BY AN AGENT.

The pretended agent of the town had no authority to sell and negotiate these bonds, because the town itself had, without a statute authorizing it to be done, no power to sell and negotiate bonds for any purpose under the act of 1852. As we have seen in the case of *Gause* v. *Clarksville, supra*, even if the moneys had been actually paid to the town upon these bonds, the bonds themselves would not, therefore, be a basis of recovery; although an action would lie for the moneys received by the town. This is because such bonds, issued without any authority, are not valid obligations of the corporation. The town itself having no power to issue, sell and negotiate its bonds, could not legally appoint an agent for that purpose. An agent can have no greater powers than his principal.

The citizen property owners of the town wishing to provide means for the liquidation of its bonded debt of 1868, for that purpose in May, 1878, petitioned the Board of Trustees "*to contract a loan to pay the indebtedness of said town.*" This is the exact language of the petition and it corresponds precisely with the statute which forbids the borrowing of money, unless upon petition of the property owners to "*contract a loan.*" Now if this petition were signed by the requisite number of citizen property holders, concerning which there are no recitals in the bonds and coupons, nor allegations in the complaint—then the Board of Trustees were authorized under the law, and under the petition "to

contract a loan," and to pass an ordinance prescribing the terms of such *loan*, and the character of the securities which they would issue to lenders. But the Board of Trustees did not obey the law or follow the terms of the petition. They passed no ordinance concerning any *loan*, the thing prayed for and authorized by the statute, and the petition under it. What they did was to pass an ordinance for the issue, negotiation and sale of bonds for the purpose of "paying or funding the indebtedness of the town;" under which ordinance these bonds in suit were issued. But the fact that these bonds were issued in pursuance of an *ordinance*, without a law behind the ordinance authorizing their issue, negotiation and sale, gives no validity to such bonds.

A municipal corporation can not add to or increase its powers by its own ordinances. An ordinance, passed for the purpose of authorizing an issue, negotiation and sale of the bonds of the town, for any purpose, without a statute conferring upon the Trustees of the town the power to pass it, is a mere nullity.

"The by-laws, ordinances and action of a municipal cor-
"poration must be subject to and in accordance with the
"act of incorporation; and corporate powers can not be en-
"larged by such by-laws and ordinances."

Thompson v. *Carroll*, 22 Howard, U. S., 422.
Paul v. *City of Kenosha*, 22 Wis. 266.
Andrews v. *Insurance Co.*, 37 Me. 256.
Katzenberger v. *Aberdeen*, 121 U. S., p. 172, p. 177 of opinion.

This court in the case last cited treating upon this subject say, that "to hold otherwise would be to invest a municipal corporation with full legislative power and make it superior to the laws by which it was created." And we assert that to hold in this case that the bonds sued on are valid obligations of the town, merely because they were authorized by an ordinance, would be to clothe this diminutive municipality with greater powers than ever were exer-

cised by any city, county, state, or even by the United States. None of these larger and more sovereign corporations have ever issued their bonds negotiable and salable in the market generally, without a law conferring express authority to do so, and prescribing in detail the terms and conditions of such negotiation and sale.

THE NEGOTIABLE FORM OF THE BONDS.

The fact that the bonds in suit were issued in the form of negotiable paper, and that they were acquired by the plaintiff in good faith, for valuable consideration, before maturity, does not in any way legalize the action of the town board in issuing them, nor give such securities any additional force or validity. *Before* these considerations can have any weight there must be shown a lawful right and power in the corporation to make, negotiate and sell such securities. Where no power under the law is shown to make and negotiate the paper there can be no innocent holder of it.

Marsh v. *Fulton Co.*, 10 Wallace, U. S., p. 676.

"Even a *bona fide* holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond. Recitals on the face of the bond, or acts *in pais* operating by way of estoppel, may cure irregularities in the execution of a statutory power, but they can not create it. If, as in the present case, legislative authority was wanting, the bond has no validity."

Hays v. *Holly Springs*, 114 U. S., p. 120. See pp. 126 and 127 of opinion.

"Negotiability will not validate obligations which are not binding because of a want of power to make or issue them." See *Clark* v. *City of Des Moines*, 87 Am. Dec. 423. Persons dealing with municipal corporations are bound to know the extent of the powers of their officers. *Idem.*

The party proposing to purchase what purported to be public securities, such as the bonds of a municipal corporation, is bound to inquire in the first instance whether the

corporation has power to issue and sell such bonds, and this is the case whether he buy in the first instance of the corporation or from a subsequent holder of such bonds. This power to issue and negotiate such bonds in the case of incorporated towns, depends upon public law and the proceedings of the corporation passed in accordance therewith.

The public law of the State of Indiana, every one dealing in securities uttered under it, or purporting to be made under it, is bound to know.

The proceedings and ordinances of an incorporated town are public records, open to the examination and inspection of any one desiring access thereto. Herein they differ from the records and books of private corporations. Every one has the opportunity to know them, and become acquainted with their contents. Hence no one can purchase municipal bonds of a public corporation, either in ignorance of the law concerning them, which he is presumed to know, or in ignorance of the facts concerning them, which he has the means of knowing.

Town of Oakland v. *Skinner*, 94 U. S. 257.
McClure v. *Town of Oxford*, 94 U. S. 432.
Marshall Co. v. *Cook*, 38 Ill. 44.
Bissell v. *Kankakee*, 64 Ill. 249.

Under these circumstances, the fact that the plaintiff knew at the time he purchased them of no irregularities in the bonds, and was not aware of any objections to their payment, is wholly immaterial. He was bound to know the powers granted under section 27. He was bound to know that it conferred no power to issue bonds for negotiation and sale in the market; that it only authorized the borrowing of money by a petition "to contract a loan." He was bound to examine the ordinance of "May 13, 1878," the ordinance referred to in the face of the bonds; and to inspect and examine the contents of the petition upon which the ordinance purported to have been adopted. On examination of the petition, he would see that it empowered the Trustees "to

contract a loan to pay off the indebtedness of said town." On examination of the ordinance mentioned in the face of the bonds, he must see at a glance that it said nothing about a loan; that it pretended to authorize an issue, negotiation and sale of the bonds of the town for the purpose of *funding* its indebtedness—an operation which was in itself a total departure from the petition, a violation of the law, and a thing wholly without any authority.

Under these circumstances the plaintiff, if and when he purchased this paper, must have had knowledge from the very face of the bonds, and from the contents of the ordinance under which they were issued, which ordinance is referred to in the bonds, that they were not issued to a lender of moneys, in accordance with the law and the petition for the purpose of "contracting a loan;" but that they were issued generally for negotiation and sale in the market; a thing wholly illegal and unauthorized.

It may be argued that the bonds sued on were issued as evidence of a pre-existing debt, that this pre-existing debt was a valid one, and therefore these bonds must be valid. But we submit that the bonds in suit were not issued as evidences of a pre-existing debt, or in lieu of prior bonds outstanding. In such case they would not have been issued generally for sale upon the market. They would have been issued to the holders of the old bonds given for the pre-existing debt, and the debt, the debtor and the creditor would have been and remained the same. These bonds were not issued to take the place of others pre-existing. They were issued to be negotiated and sold, thus creating a *new debt*, not evidencing an *old* one. The distinction between issuing bonds merely as evidence of a debt or loan and issuing bonds for negotiation and sale generally is at the foundation of all the funding acts of the different municipal corporations, towns, townships, counties, cities and states. All these are municipal corporations. They may under special acts, empowering them to do so, negotiate and sell their bonds—

they have no inherent or incidental power of doing so—and have never attempted to sell and negotiate their bonds except upon express legislative authority for that purpose.

We can not think that under the section 27 of the original act of incorporation of towns the Board of Trustees thereof had power to negotiate and sell the bonds of the town for the purpose of funding its indebtedness. Even cities in Indiana did not have this power until 1877, at which time an act was passed expressly authorizing *cities* to negotiate and sell their bonds for the purpose of funding the city indebtedness. See Act 1877, p. 14.

The character and existence of this act last cited, authorizing the "negotiation and sale" of their bonds by *cities* in Indiana, for the purpose of funding their indebtedness, shows that, without and before such legislative authority, even cities could not make and sell their bonds for funding purposes; much less could towns do so.

Something is claimed by the plaintiff as to the affirming or ratification of the bonds sued on. Concerning this we remark there could be no ratification without power in the first instance to do the thing ratified.

"A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of *previous* authority. It operates upon the act ratified in the same manner as though the authority to do it existed originally." It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified.

Marsh v. *Fulton Co.*, 10 Wall., U. S., p. 684.

Hays v. *Holly Springs*, 114 U. S. 120. See pp. 126 and 127 of opinion.

The town had no power originally to issue and negotiate the bonds sued on. Having not such power, no subsequent act could ratify them.

The same doctrine is laid down in the passage below quoted:

"A municipal corporation may ratify the unauthorized

acts and contracts of its agents or officers, which are within its corporate powers, but not otherwise. The same principle is applicable to corporations as to individuals, but a subsequent ratification can not make valid an unlawful act without the scope of corporate authority."

1 Dillon Municipal Corporations (3d ed.), p. 460, section 463.

The learned counsel for the plaintiff in his brief says at p. 27: "The interest coupons were paid for a time" upon these bonds. This is a mistake. Nothing has ever been paid, either of principal or interest, on these bonds. The special findings show no such payment. Even if there had been a partial payment it would not have validated these bonds. From authorities already cited it is clear that no such payment or other act *in pais* could operate as an estoppel against the town or as a confirmation of the validity of these bonds.

The fact that the town recovered by suit a part of this money, that it instituted suit for the recovery of another part, which it failed to prosecute, is not material to the questions in argument.

If these bonds had been forgeries in fact, as they were and are in law and morals, the town would have had a clear right to recover the moneys realized by such an abuse of its credit from the person who had so procured them; but such recovery would not have operated in any way to legalize or make genuine the false and forged bonds made use of by the wrong-doer.

These bonds in their very inception were made and executed without any authority of law. They were and are wholly *ultra vires,* and this defect can not be cured by any act of the town or the holder of the bonds. They can in no case be made a lawful cause of action, or the foundation for any recovery against the defendant.

There is no error in this record.

We therefore pray by reason of the premises that the judgment of the court below be in all things affirmed.

Very respectfully submitted,

DAVID TURPIE,
WILLIAM E. UHL,
Attorneys for the defendant in error.

Office Supreme Court U. S.
FILED.
DEC 27 1890
JAMES H. McKENNEY,
CLERK.

MERRILL *v.* TOWN OF MONTICELLO.

14 Fed. Rep. 628.

(Circuit Court, D. Indiana. December, 1882.)

Gresham, D. J. On the twentieth day of May, 1878, the town of Monticello made and issued a series of coupon bonds, each for $100, and amounting in all to $21,000, payable in gold, to bearer, at New York, in ten years, with interest at the rate of 7 per cent. per annum, in gold, at the same place. The principal of each bond was to become due and payable, at the option of the holder, on the non-payment of any coupon thereto attached, for 90 days after maturity. The words "funding bonds of the town of Monticello" conspicuously appear at the top of each bond, and each recites that "this bond is one of a series of $21,000 authorized by the said town by an ordinance passed by the board of trustees thereof on the thirteenth day of May, 1878, for the purpose of funding the indebtedness of said town." The coupons numbered 2, attached to each bond, were presented at the proper place, at maturity, and payment was refused. The plaintiff, as holder of the entire series, thereupon elected to declare the principal sum due, and brought this suit.

The amended answer avers that on the twenty-fourth day of January, 1869, a petition was presented to the board of trustees of the town, by the school trustees, for the issue of bonds to build a school-house, and on the same day the town trustees passed an ordinance directing that there be issued to the school trustees $20,000 worth of coupon bonds, in denominations of $100 each, drawing interest at the rate of 10 per cent. per annum, payable annually; that on the first day of May, 1869, the town issued its bonds under this ordinance, amounting to $20,000, payable in 20* years; that these bonds, representing the sole indebtedness of the town at the

*Note.—This is error—the bonds matured in ten years.

time of their issue, are, as to the principal thereof, outstanding and unpaid obligations; that on the eleventh day of May, 1878, the owners of the taxable property of the town petitioned the board of trustees of the town to contract a loan of $21,000 for the purpose of paying its indebtedness; that on the same day the board passed and entered of record the following ordinance:

"Be it ordained by the board of trustees of the town of Monticello, Indiana, that said town issue bonds in the sum of $21,000, in denominations of $100, bearing interest at the rate of 7 per cent. per annum, payable in gold, to provide the means with which to pay the indebtedness of said town. And be it further ordained, that when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale; and further, that said bonds shall not be sold for less than 94 cents on the dollar."

—That on the twentieth day of May, 1878, the trustees issued the coupon bonds of the town to the amount of $21,000, bearing interest at the rate of 7 per cent. per annum, payable annually, and maturing as to principal in 10 years; that after their issue these bonds, which are the bonds sued on, were delivered to J. C. Wilson, for sale, who sold the same and converted the proceeds to his own use, the town deriving no benefit therefrom, and at the time such bonds were issued the defendant was an incorporated town, containing not more than 1,300 inhabitants.

The legislature, by an act passed in 1852, provided for the incorporation of towns, and defined their powers. This act authorized debts to be contracted for the usual municipal purposes. Section 27 (Rev. St. § 3342) reads thus:

"No incorporated town under this act shall have power to borrow money, or incur any debt or liability, unless the citizens, owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt or loan; and such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same; and for any debt contracted thereby, the trustees shall add to the tax duplicate of each year, successively, a levy sufficient to pay the accrued interest on such debt or loan, with an addition of not less than five cents on the hundred dollars to create a sinking fund for the liquidation of the principal thereof."

This section granted no power to contract debts or to fund indebtedness. It simply prescribed the mode in which the power elsewhere granted was to be exercised, and it was therefore a limitation upon that power. By acts subsequently passed, and in force in May, 1878, towns were authorized to contract debts in the purchase of ground and the erection thereon of school buildings, and to aid in the construction of gravel roads, and for some other purposes. But the powers granted by these acts were to be exercised under clearly-defined restrictions and limitations as to amount, time of payment, rate of interest, etc., and taxes were required to be levied, as in the section above quoted, for the prompt payment of the accruing interest, and the principal at maturity. Obviously it was not intended that the indebtness contracted under these acts should be renewed by issuing funding bonds or otherwise. If there was authority for the issuing of the bonds of May, 1878, then the restrictions imposed by the legislature on the exercise of the power to contract debts were of no avail.

The common councils of cities were authorized, by acts passed in February, 1877, to fund their indebtedness. Rev. St. 632, 633. These acts applied to cities only. It was not until March 7, 1881, that an act was passed authorizing cities *and towns* to fund their indebtedness with bonds at par, drawing not more than 6 per cent. interest. The bonds in suit recite that they were issued to fund the town's indebtedness, and purchasers assumed, at their peril, that the legislature had authorized the issue of bonds for that purpose. No such power had been granted, and whether these bonds were intended to take the place of the outstanding series of 1869, or for some other indebtedness, notwithstanding their form, they were taken as non-negotiable paper, and subject to all legal and equitable defenses in favor of the maker. Municipal corporations have no general power to issue commercial paper. *Hopper* v. *Town of Covington*, 8 FED. REP. 777.

The demurrer to the amended answer was argued by counsel on both sides on the theory that the indebtedness to be funded was the outstanding bonds of 1869.

Rogan v. *City of Watertown*, 30 Wis. 259, was a suit on coupons attached to bonds which had been voted in aid of a railroad. The

third paragraph of the complaint seems to have been upon a coupon which had been attached to a substituted bond. This bond corresponded in number, amount, time of payment, rate of interest, and in all other respects with the bond which was surrendered and canceled at the time of the substitution. This was a mere irregularity, and the substituted bond was held valid. The case differs widely in its facts from the one at bar. If the town had got the proceeds of the bonds sued on, or had derived any benefit therefrom, the plaintiff would have a much stronger case.

Demurrer overruled.

MERRILL *v.* TOWN OF MONTICELLO.

22 Fed. Rep. 589.

(*Circuit Court, D. Indiana.* December 20, 1884.)

On Demurrer to Reply.

Woods, J. This action is brought to recover principal and interest of 143 bonds of $100 each, with coupons attached for interest at the rate of 7 per cent. per annum. The complaint alleges the execution of the bonds by the defendant, default in the payment of the second interest coupons, and that the plaintiff had elected to treat as due the principal of each bond, and before bringing the suit had notified the defendant of this election. Copies are filed with the complaint, of a bond and one coupon, which read as follows:

Exhibit A. (Copy of Bond.)

United States of America.

No. 1. State of Indiana. $100.

Funding Bond of the Town of Monticello.

Ten years after date, the town of Monticello, in the county of White, State of Indiana, promises to pay to the bearer, at the Importers' & Traders' National Bank, New York, one hundred dollars in gold, with interest thereon at the rate of seven per cent. per annum, payable annually in gold at the same place, upon presentation of the proper coupon hereto attached, without any relief whatever from the valuation or appraisement laws of the State of Indiana. The principal of this bond shall be due and payable at the option of the holder, on the non-payment, after due presentation of any of said coupons, for ninety days after the maturity thereof.

This bond is one of a series of $21,000, authorized by the said town, by an ordinance passed by the board of trustees thereof, on the thirteenth day of May, 1878, for the purpose of funding the indebtedness of the said town.

In witness whereof, the board of trustees of the town of Monticello have caused this bond and the coupons thereof to be signed by their president and clerk, and the seal of the town to be affixed hereto, at the said town of Monticello, this twentieth day of May 1878.

R. W. CHRISTY, President.

Attest: F. BOFINGER Clerk.

(COPY OF COUPON.)

The town of Monticello, Indiana, will pay the bearer, in gold coin, seven dollars, without relief from valuation or appraisement laws of the State of Indiana, at the Importers' & Traders' National Bank, New York, on the twentieth day of May, 1880, being one year's interest on Bond No. 1.

R. W. CHRISTY, President.

Attest: F. BOFINGER, Clerk.

The sixth paragraph of answer, in substance, is this:

That the defendant is, and when the bonds mentioned were issued, was, a town incorporated under the general laws of the State of Indiana, and possessed of such powers only as were conferred by law upon such bodies; that upon the twenty-fourth day of January, 1869, upon and in compliance with a petition of its school trustees, the defendant, by its board of trustees, enacted an ordinance to the effect that bonds of the town to the amount of $20,000, with coupons for interest at the rate of 10 per centum, be issued to the school trustees of the town to aid in the building of a school-house; that afterwards, on the first day of May, 1869, the town issued its bonds accordingly to the amount stated, to mature 10 years after date; that these bonds were sold, and yet remain outstanding and unpaid obligations of the town, as to the principal sum thereof, and are, and when the bonds in suit were issued, were, *the only indebtedness of the town*; that on the eleventh day of May, 1878, a petition was presented to the trustees of the town by the owners of taxable property therein, which petition (omitting date and the names of signers) reads as follows:

"The undersigned, citizens of the town of Monticello, Indiana, and owners of the taxable property therein, respectfully petition that you, as trustees of said town, contract a loan for said town, for the purpose of paying the indebtedness thereof, in the sum of twenty-one thousand dollars."

That afterwards, on the same day, the board of trustees entered in their record the following ordinance:

"Be it ordained by the board of trustees of the town of Monticello, Indiana, that said town issue bonds in the sum of twenty-one thousand dollars, in denominations of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town; and be it further ordained, that when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustee, for negotiation and sale; and be it further ordained, that said bonds shall not be sold at a price less than ninety-four cents on the dollar."

That afterwards, on the twentieth day of May, 1878, there were made and issued by the board of trustees of said town the coupon bonds of the town to the amount of $21,000, each entitled "Funding Bond of the Town of Monticello," and purporting to be issued "for the purpose of funding the indebtedness of said town;" that these are the bonds and coupons sued on; that when issued they were delivered to J. C. Wilson, under the ordinance aforesaid, who negotiated and sold them upon his own account, and converted the proceeds to his own use, the town not having received any part of the proceeds. A demurrer to this answer, for want of facts, was overruled. *Merrill* v. *Town of Monticello*, 14 FED. REP. 628.

The reply, which is now in question, besides other things not deemed material to be stated here, contains allegations to the effect following:

That said Wilson negotiated and sold the bonds on June 1, 1878,* in the market at par, for cash, and delivered them to the purchaser, for and on behalf of the town, and received from the purchaser for the town the price, to-wit, $21,000; that thereafter, in July, the plaintiff bought one hundred and forty-three of the bonds, being those sued on, in open market in the city of Boston, at par, and paid cash therefor, without notice of the failure of Wilson to pay the money received by him therefor to the defendant; that there was lawful authority for the issuance of the bonds, because the town was without means, and without power by tax levies or otherwise to obtain means, to pay its said indebtedness then due and about to become due.

Is this a good reply? Manifestly the case presented differs essentially from that shown by the answer, in this: The reply shows a necessity to borrow money to meet at maturity an indebtedness, for

*NOTE.—The exact date was April 14, 1879, vide par. 5, Special Finding, Rec. p. 29.

which, under existing laws, the town had no other means of providing payment. The question, therefore, is whether, under this necessity, the town had power to borrow and to give bonds for the amount of the loan. If so, it is insisted that the authority must be found in section 27 of the act of 1852, (section 3342, Revision 1881,) which reads as follows:

"No incorporated town under this act shall have power to borrow money or incur any debt or liability, unless the citizen owners of five-eights of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt or loan. And such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same."

In 1867, 1869, 1873, and 1875, special laws were passed defining the powers of cities and towns in Indiana to borrow money for the purchase of grounds for school-houses, and for the building of school-houses, and authorizing the issue and sale of bonds to obtain money for these purposes. The provisions of these laws, so far as yet in force, are contained in sections 3343, 3344, 3345, 4488, and 4489 of the Revision of 1881. In *Clark* v. *Noblesville*, 44 Ind. 83, it was held that section 27 of the act of 1852 was repealed by the act of March 3, 1873, (sections 4488, 4489, *supra*,) for the purposes specified in the latter act. By the same rule section 27 must be deemed to have been repealed by the act of 1867 in respect to the subjects embraced in that act. The first section of the act of 1867 was amended by the act of 1869, and superseded by the act of 1873, whereby the maximum amount for which bonds of the kind provided for in these acts may be issued was $50,000, instead of $30,000, which was the maximum under the act of 1867. The bonds issued by the town of Monticello in 1869 were executed under the act of 1867, as amended in 1869, and became an unquestioned indebtedness, which, when it should become due, the town was bound to prepare to pay, and for this purpose, it is conceded by counsel, the town had authority, in the manner prescribed in section 27, to borrow money. This involves the proposition, which I think true, that while debts for school property can be contracted and bonds given therefor only upon compliance with the special acts aforesaid upon that subject, yet if, by reason of the insufficiency of the tax levies authorized by those acts, it becomes necessary to borrow money for the payment of such debts or bonds, it must and

may be done in the manner prescribed in section 27 of the act of 1852, which, for such purpose, is still in force. But, while conceding the power to borrow, counsel deny the validity of the bonds issued in this instance, and upon this point make the following argument:

"To borrow money is not to *fund* an indebtedness; neither does it imply, nor by necessity carry with it, a power to issue bonds for sale generally, or to sell such bonds in the market. This power is entirely different from a power to issue bonds generally for sale in the money market; and this grant of power is clearly limited by the phrase at the end of section 3342, 'to contract such debt or loan.' The implied power of the town under the express power so granted, according to the authoritative judicial decisions thereon, only went to the extent of issuing a bond to the holder of a debt against the town, or to one who had lent his money to it. But the plaintiff does not claim to have been a creditor of or lender to the town, or to have bought the bonds of one who was such creditor or lender; he claims to have bought of one to whom the bonds issued were sold. We claim that the town had no power to issue its bonds for sale generally, or to sell them to any party, under the act of 1852. It had the express power, under section 27, to contract a loan, and the implied power, hence, to issue a bond to the lender; and it had the implied power to issue new bonds, in lieu of the old ones, to the holders of the old bonds, upon such time and terms as might be agreed upon between the town and the holders of the old bonds. See *City of Galena* v. *Corwith*, 48 Ill. 423. Hence there was no imperative necessity to issue bonds generally for sale upon the market. This petition is regular in its form, and was signed by the requisite number of owners of taxable property in the town, under section 27, before cited. This was all lawful enough, and in accordance with it the board of trustees might have made an ordinance for the negotiation of a loan and the issue of the town bonds to the lenders. But the board of trustees did not do this. Instead, they passed an ordinance authorizing the issue of bonds for sale generally, and directing their sale. Now we *submit* the ordinance does not follow the petition nor the statute. The power of a municipal corporation *to issue bonds* is not, nor does it imply, a power to sell such bonds. *Gould* v. *Sterling*, 23 N. Y. 439; *Daviess Co. Ct.* v. *Howard*, 13 Bush, (Ky.) 102; *Police Jury* v. *Britton*, 15 Wall. 566. There was, when these bonds were executed, no law in Indiana authorizing towns to fund their indebtedness by an issue and sale of bonds for that purpose. The legislature passed such a law in 1879, after the bonds in suit were issued."

After elaborating these views, counsel conclude by saying:

"We think it well settled in Indiana that section 27 of the act of 1852, the debt-making statute of towns incorporated thereunder, is not a grant of power at all, but an inhibition of its exercise, except upon certain conditions."

And in support of this proposition they cite *Pratt* v. *Luther*, 45 Ind. 257.

We will consider this question first. In the case referred to it is said of this section that "it is subsequent to the one which defines the powers and prescribes the duties of the board of trustees, and is to be regarded as a limitation upon the powers previously granted." This view was followed in this case in the opinion upon the demurrer to the answer, and is, doubtless, true; but it by no means excludes the further proposition that, besides limiting the powers expressly granted, it raises an implication of the right to borrow, or to incur debt or liability, upon the conditions, and in the manner prescribed, incidental and auxiliary to the express powers given, to be exercised whenever necessary to the proper use of such express powers. Without such a provision, it may be doubtful whether the power to borrow would be implied as incidental to the ordinary powers of a municipality. Dill. Mun. Corp. § § 81, 82, 407. With this provision, I think there can be no reasonable doubt of it. Indeed, this much was inferable from the decision in *Pratt* v. *Luther*, and is explicitly stated in the later case of the *Second Nat. Bank* v. *Town of Danville*, 60 Ind. 504. The question in the latter case was whether or not certain notes given by the town, upon the purchase of a fire-engine, were valid; and, after reciting the clause authorizing the purchase, and also the twenty-seventh section, the court says:

> "The first of the sections of the statute authorized the town to purchase an engine for cash. The second gave the town power, on the proper petition, to contract a debt in two modes: one by purchasing an engine on credit, and the other to create a debt by way of a loan, to raise the money to pay for it on its purchase."

And the Court held that the notes of the town, "commercial or otherwise," were lawfully made. See, also, *Clark* v. *Town of Noblesville*, *supra*; *Miller* v. *Board Com'rs*, 66 Ind. 162, 166, 167; *Thompson* v. *City of Peru*, 29 Ind. 305; *City of Galena* v. *Corwith*, *supra*; *Com.* v. *Pittsburgh*, 41 Pa. St. 278. While not, therefore, in itself a substantive grant of power, this twenty-seventh section of the statute clearly evinces the legislative understanding and intent that the right to borrow, or otherwise contract debt or liability, might be employed as incidental to the express powers given in that or any subsequent act containing no inconsistent provision. And this,

as it seems to me, includes a case where the power is necessary, in order to prevent default in the payment of obligations incurred under explicit authority, for the liquidation of which no other sufficient or exclusive provision has been made. It is not to be inferred from this that "the financial necessity of the town can operate to enlarge its powers," but only that such necessity may afford the requisite occasion for their exercise. While the special acts of 1867 and 1869 required levies of special taxes for payment of principal and interest of the bonds thereby authorized, not exceeding 50 cents on any $100 of taxable property and $1 on each poll, they contain no restriction of the municipal liability on such bonds to the special provision so made; and consequently, when, as in this case, that provision proved inadequate, the town was liable generally for the deficiency, (*U. S.* v. *County of Clark*, 96 U. S. 211; *Kimball* v. *Board Com'rs*, 21 FED. REP. 145), and had the right to resort to its power to borrow.

Having concluded that under the circumstances the town had the right to borrow, we come to the question whether or not the bonds in suit were issued in the lawful exercise of that power. The argument for the defense, as we have seen, turns upon the supposed difference between a power to issue bonds to a lender and a power to issue them for sale in the market. It is conceded, for the purpose of the argument, at least, that the power to borrow existed, and that from that an implied power arose to issue negotiable securities to the lender; but it is insisted that this differs essentially from a right to put the bonds of the town upon the market for sale. If there be a difference legally, in what does it consist? When a town would borrow money, how shall it find the lender? Manifestly, from the power to borrow and the implied power to give the ordinary forms of obligations, arises the further implication of right to seek the lender; and in the absence of restriction in that respect, to seek him in whatever reasonable manner and place he may be found, whether in the banks, on the boards of trade, or elsewhere. And since, in any case, the town must act by an agent, I see no reason, except of policy not affecting the question of power, why it may not send its agent with bonds duly prepared for delivery to be disposed of to any, who, upon the prescribed terms, will take them. In common parlance, and sometimes in the language of legislative enactment, this is called a *sale*; but it is a misnomer. It is an issue

or execution of the bond, and the purchaser (so called) is a lender in fact, since, strictly speaking, a person, or corporation, can not sell his own obligation. Until delivered to the other party, it is not an obligation, and only when delivered, whether to the highest bidder in open market or to the taker found in any other way and place, does it become effective and binding; and he who receives it and pays, or rather surrenders, his money for it, is a lender, not distinguishable legally from one who takes a bond payable to him in his proper name. Wherefore, as it seems to me, the alleged distinction between the conceded power and the power exercised is not substantial; neither is it justified by the cases cited in support of it.

In *Gould* v. *Sterling* it was held that a town, empowered to borrow money to aid in the construction of a railroad, could not issue its bonds directly to the railroad company; and while the reason given for this ruling seems to me convincing, it is not applicable here. The contrary, however, is decided in *Rogers* v. *Burlington*, 3 Wall. 654; *Town of Venice* v. *Murdock*, 92 U. S. 494; *City of Savannah* v. *Kelly*, 108 U. S. 184; *Evansville, etc., R. Co.* v. *City of Evansville*, 15 Ind. 395, and *Second Nat. Bank* v. *Town of Danville, supra.* In *Police Jury* v. *Britton*, it was held that a municipality, possessed of "the power of levying taxes to defray the necessary expenditures of the jurisdiction," has no implied authority to issue negotiable securities for the purpose of raising money or funding a previous debt. The case concedes the right to give such obligations as incidental to the power to borrow, when that exists. In *Daviess Co.* v. *Howard* occurs the *dictum* that "the power to issue the bonds does not imply the power to sell;" but this was said in respect to a power given a county to subscribe to the stock of a railroad company, and "to issue the bonds of the county for the amount of the stock subscribed, or any part thereof." The point decided was that under this power the bonds could not be issued to the railroad company at less than par value nor sold at a discount for the purpose of obtaining money to be paid to the company upon the county's subscription to the stock. Neither explicitly nor by implication is it said or held that the power to issue bonds does not imply the power to sell or negotiate them in the sense now under consideration. The Supreme Court of Indiana, however, has spoken on the subject: once directly, and oftener by

implication. In *Thompson* v. *City of Peru*, *supra*, concerning the power to borrow, the Court said: "The issuing and sale of bonds in the market is the most usual and ordinary method adopted by corporations to borrow money." And, to the same effect, see *Evansville, etc., R. Co.* v. *City of Evansville*, and other cases already cited.

The remaining inquiry is whether the bonds in suit are invalid because they purport to be funding bonds. The petition and ordinance pursuant to which they were issued say nothing of funding, and in terms embrace only the purpose of obtaining money to pay the town's indebtedness; and consequently the legend, "Funding Bond," and the recital of the purpose to fund the debt, as I suppose, can be regarded, in any view, as nothing more than mistakes, in no way affecting the nature of the transaction nor of the securities, except, as was held in the opinion on the demurrer to the answer, to put the purchaser on inquiry. But since, upon the averments of the reply, we hold that the bonds were lawfully issued, and as a consequence must hold that the town is bound by the acts of its duly-appointed agent, notwithstanding his failure to account for the moneys which he received, it is no longer material to consider whether or not the paper is negotiable by the law merchant, and the plaintiff a *bona fide* holder. Granting, however, if necessary, that these bonds, in a sense, must be regarded as funding bonds, I am of opinion that their issue was not unlawful on that account. To fund is "to put up into the form of bonds or stocks bearing regular interest," and "to provide and appropriate a fund or permanent revenue for the payment of the interest." Webst. Dict.; Bouv. Law Dict. By the same authority, a "funding system" is "a plan which provides that on the creation of a public loan funds shall immediately be *formed* and secured by law for the payment of the interest, and also for the gradual redemption of the capital itself." If the bonds in question come within these definitions, they come equally within the scope of section 27, which declares that "for any debt contracted thereby the trustees shall add to the tax duplicate of each year, successively, a levy sufficient to pay the accrued interest on such debt or loan, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof." Instead, therefore, of the acts of 1879 and 1881 being the first to confer funding powers upon towns, those acts, while in some respects bestowing new power,

in other respects constitute restrictions upon power already existing under section 27 of the law of 1852. I do not mean of course, that section 27 contains or carries an implication of power to execute a general funding scheme, embracing a variety of debts, whether floating or bonded, due or not due, such as is expressly conferred in the act of March 7, 1881, but manifestly any debt incurred under the restrictions of that section must be a funded debt, whether so called or not, and bonds issued therefore, if subject to no other vice, can not reasonably be deemed invalid merely because they purport to be funding bonds.

Demurrer overruled.

138-694
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 138.

J. C. ANDERSON, ADMINISTRATOR OF THE ESTATE OF EDWARD J. WILSON, DECEASED; THOMAS EMMETT WILSON, SARAH J. DAVIS, AND GEORGE W. DAVIS, APPELLANTS,

vs.

JAMES S. WATT, EXECUTOR OF JAMES SYMINGTON, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

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a United States Circuit Court, 5th Judicial Circuit, Northern District of Florida, Jacksonville Division.

JAMES S. WATT, Executor of James Symington, Dec'd, Complainant,
vs.
J. C. ANDERSON, Adm'r of Estate of Edward J. Wilson, Dec'd, *et al.*, Defendants.
} In Equity.

Appeal from circuit court, northern district of Florida.

A. W. Cockrell & Son, solicitors for complainants; Fleming & Daniel, solicitors for defendants.

1 To the honorable the judges of the circuit court of the United States of America for the northern district of the State of Florida:

Gustavus W. Faber and James S. Watt, both of the city and State of New York and citizens of the State of New York, executors of the last will of James Symington, deceased, late of the State of New York, *and* as such executors bring this their bill against J. C. Anderson, of Orlando, Orange country, Florida, a citizen of the State of Florida, as the administrator of Edward J. Wilson, deceased, and Thomas Emmett Wilson and Sarah J. Davies, both of Sylvan Lake, Orange county, Florida, citizens of the State of Florida.

And thereupon your orators complain and say:

1. On the 28th day of August, 1875, one Edward J. Wilson was indebted to your orators' testator, James Symington, in the sum of thirteen thousand dollars, as evidenced by his certain bond duly signed, sealed, and delivered to the said James Symington, the original of which is herewith filed as part hereof, marked "Exhibit A," and the said Edward J. Wilson on said day was seized and possessed and in the actual possession of "all that tract and parcel of land lying, situate, and being in the county of Orange and State of Florida and known and designated in the survey of the public lands as the southwest quarter of section thirty (30), in township nineteen (19) south, of range thirty (30) east, containing one hundred and sixty (160) acres," all in said northern district of Florida, which said lands said Edward J. Wilson then and there held under and by virtue of a patent of the United States of America made and executed and delivered to him on the 10th day of April,
2 1875, which said patent is recorded in Book P of Deeds on page 315, in the office of the circuit court clerk in and for said county, and being so seized and possessed the said Edward J. Wilson, to secure the payment of said bond, executed to the said James Symington on said day his mortgage deed, which was duly sealed, delivered, attested, and acknowledged, the original of which mortgage deed is herewith filed as part hereof, marked "Exhibit B."

2. The said Edward J. Wilson, some time subsequent to the execution of said mortgage deed, departed this life, leaving the said

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bond, both as to principal and interest, wholly unpaid to the said James Symington.

3. The said James Symington during the year 1877, while a resident of the State of New York, died therein, leaving a last will, naming therein your orators as executors thereof, by which he disposed of all his property, and which was duly admitted to probate and record in and by the surrogate court, county of New York, in the State of New York, the domicile of said James Symington; and your orators, on the 29th day of October, 1877, duly qualified as such executors. A duly certified copy of their letters testamentary is herewith filed as part hereof, marked "Exhibit C," and thereupon your orators took upon themselves the duties of such executors, and are now administering the estate of said James Symington, deceased, under said last will.

4. On the 29th day of July, 1885, the said J. C. Anderson was duly appointed by the county court of said Orange county, sitting as a court of probate, which had jurisdiction thereof, administrator of the estate of Edward J. Wilson, deceased, and is now acting
3 as such.

5. The said Thomas Emmett Wilson and the said Sarah J. Davies are now in the actual possession of the said premises so mortgaged to your orators' testator, as aforesaid, claiming to have some interest therein or some part thereof as purchaser, mortgagee, or otherwise; but said claims, whatever they may be, have accrued subsequent to the lien created by said mortgage deed herein sought to be enforced, and are now subject thereto.

6. The debt so sought to be secured to the said Symington, deceased, both as to principal and interest, is wholly due and unpaid, and your orators, by virtue of the premises, are entitled to the aid of this honorable court in the collection of said debt, accruing to them as executors of said estate, by foreclosure of said mortgage deed and a sale of said premises under the order of this honorable court to satisfy the lien created thereby.

To the end, therefore, that the said J. C. Anderson, in his capacity as the administrator of the estate of Edward J. Wilson, deceased, and the said Thomas Emmett Wilson and the said Sarah J. Davies, may, if they can, show why your orators should not have the relief herein prayed and may severally full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged as fully as if specifically interrogated as to the same, but not on oath, answer on oath as to each of said defendants being hereby waived; that an account may be taken by and under the direction of this honorable court of what is now due and owing to your orators for principal and interest upon said bond and
4 mortgage indebtedness, and the amount thereof be adjudged a valid lien upon the said premises so conveyed by said mortgage deed; that said lien so adjudicated be inforced by a sale of said premises as this honorable court shall direct; that upon a confirmation of said sale and a delivery of the deed therefor to the purchaser thereat the said purchaser be put into possession of said premises; that the purchase-money raised by said sale be applied to the pay-

ment of the costs incurred by your orators, including the expenses of said sale, and to the discharge of the said debt so adjudged a lien upon said premises; that said defendants and all other persons claiming under them subsequent to the commencement of this suit and all other persons, although not parties to this suit, having any liens or claims upon said premises subsequent to the mortgage of your orators' testator may be barred and foreclosed of all equity of redemption or other interest in said premises—

And that your orators may have such further and other or further or other relief in the premises as to this honorable court may seem just and may consist with equity:

May it please your honors to grant unto your orators the most gracious writ of subpœna issuing out of and under the seal of your honorable court, to be directed to the said defendants, the said J. C. Anderson, as administrator of the estate of Edward J. Wilson, deceased, the said Thomas Emmett Wilson, and the said Sarah J. Davies, commanding them and each of them, on a certain day
5 and under a certain penalty, that they personally be and appear before the judges of this circuit court of the United States of America for the northern district of Florida, in the court-room at the city of Jacksonville, Florida, then and there to answer all and singular the premises and to abide by and perform such orders and decrees herein as shall be agreeable to equity and good conscience.

And your orators will ever pray, &c.

A. W. COCKRELL & SON,
Solicitors for Gustavus W. Faber & James S. Watt, Executors of James Symington.

Endorsement: In the circuit court of the United States for the northern district of Florida. Faber & Watt, executors of James Symington, *vs.* Anderson, adm'r E. J. Wilson; Thos. E. Wilson, *et al.* In equity. Bill of complaint. Filed Aug. 25, 1885. Philip Walter, clerk. A. W. Cockrell & Son, solicitors for complainants.

6 Know all men by these presents that I, Edward J. Wilson, of the city and State of New York, counsellor-at-law, am held and firmly bound unto James Symington, of the said city of New York, gentleman, in the sum of twenty-six thousand dollars, lawful money of the United States of America, to be paid to the said James Symington, his executors, administrators, or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal and dated the first day of February, one thousand eight hundred and seventy-five.

The condition of the above obligation is such that if the above-bounden Edward J. Wilson, his heirs, executors, or administrators, shall well and truly pay or cause to be paid unto the above-named James Symington, his executors, administrators, or assigns, the just and full sum of thirteen thousand dollars, lawful money as aforesaid, on the first day of February, in the year one thousand eight hundred and seventy-six, and the interest thereon to be computed

from the date hereof at and after the rate of seven per cent. per annum and to be paid half yearly, without any fraud or other delay, then the above obligation to be void; otherwise to remain in full force and virtue.

And it is hereby expressly agreed that should any default be made in the payment of the said interest or of any part thereof on any day whereon the same is made payable, as above expressed, and should the same remain unpaid and in arrears for the space of thirty days,

7 then and from thenceforth—that is to say, after the lapse of the said thirty days—the aforesaid principal sum of thirteen thousand dollars, with all arrearage of interest thereon, shall, at the option of the said James Symington or his legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

EDW. J. WILSON. [SEAL.]

Sealed and delivered in the presence of—
EDW'D GRAHAM,
No. 10 *Wall St., N. Y.*

Endorsement: Edward J. Wilson to James Symington. Dated February 1st, 1875. Bond. In the circuit court of the United States for the northern district of Florida. Faber & Watt, executors of James Symington, *vs.* Anderson, administrator E. J. Wilson; Thos. E. Wilson, *et al.* In equity. Exhibit A, to the bill of complaint. Filed Aug. 25, 1885. Philip Walter, clerk. A. W. Cockrell & Son, sol's for compl'ts.

8 This indenture, made the twenty-eighth day of August, in the year one thousand eight hundred and seventy-five, between Edward J. Wilson, of the city of New York, attorney-at-law, being unmarried, party of the first part, and James Symington, of the city of New York, party of the second part.

Whereas the said party of the first part is indebted to the said party of the second part in the sum of thirteen thousand dollars, secured by the mortgage of the said party of the first part to the said party of the second part in the sum above mentioned on certain property in the town of White Plains, in the county of Westchester and State of New York; and whereas the said party of the first part desires to give to the said party of the second part additional security for the payment of said sum of thirteen thousand dollars:

Now, this indenture witnesseth: That the said party of the first part, for the better securing the indebtedness aforesaid according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed, and confirmed, and by

these presents does grant, bargain, sell, alien, release, convey, and confirm, unto the said party of the second part and to his heirs and assigns forever all that tract and parcel of land situate, lying, and being in the county of Orange and State of Florida and known and designated in the survey of public lands as the southwest quarter (S. W. qr.) of section thirty (sec. thirty), in township nine-
9 teen south (T. 19 S.) of range thirty east (R. 30 E.), containing one hundred and sixty acres—

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the same and every part and parcel thereof, with the appurtenances:

To have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever: Provided always, and these presents are upon this express condition, that — the said party of the first part shall pay the said party of the second part the said sum of thirteen thousand dollars at the time and in the manner mentioned in the foregoing-mentioned mortgage, then these presents shall be void; otherwise to remain in full force and virtue.

And if default shall be made in the payment of the said sum of money above mentioned or the interest that may grow due thereon or of any part thereof that then and from thenceforth it shall be lawful for the said party of the second part, his executors, administrators, and assigns, to enter into and upon all and singular the premises hereby granted or intended so to be, and to sell and dispose of the same and all benefit and equity of redemption of the said party of the first part, his heirs, executors, administrators, or assigns therein, at public auction, according to the act in such
10 case made and provided; and as the attorney of the said party of the first part, for that purpose by these presents duly authorized, constituted, and appointed, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same in fee simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said indebtedness, together with the costs and charges of advertisement and sale of said premises, rendering the overplus of the purchase-money (if any there shall be) unto the said Edward J. Wilson, his heirs, executors, administrators, or assigns; which sale so to be made shall forever be a perpetual bar, both in law and equity, against the said party of the first part, his heirs and assigns, and all other persons claiming or to claim the premises or any part thereof by, from, or under him or them or either of them.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

EDW. J. WILSON. [SEAL.]

Sealed and delivered in the presence of—
SAM'L GOLDSMITH.
B. RUSH STODDARD.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this first day of September, A. D. 1875, before me, B. Rush Stoddard, a notary public in and for the city and county of New York, in the State of New York, duly commissioned and sworn, personally appeared Edward J. Wilson, to me well known to be the person described in and who executed the foregoing instrument, and acknowledged the execution thereof to be his free act and
11 deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year last above mentioned.

[SEAL.] B. RUSH STODDARD,
Notary Public (273) *New York City and County.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, William Walsh, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that B. Rush Stoddard, whose name is subscribed to the certificate of the proof of acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof or acknowledgment a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof I have hereunto set my hand and
12 affixed the seal of the said court and county the 24th day of April, 1876.

[SEAL.] WM. WALSH, *Clerk.*

Endorsement: Edward J. Wilson to James Symington. Dated Aug. 28th, 1875. Mortgage. Mitchells and A. B. Crane, counselors-at-law, 92 Broadway, New York city. Filed for record in the office of the clerk of the circuit court for Orange county, Florida, on the 3rd day of May, 1876, and recorded in Book No. 2 of Miscellaneous Records of Orange County, on pages 153, 154, 155, & 156, the fifth day of May, 1876. J. P. Hughey, clerk circuit court for Orange county, Florida, by C. A. Bòone, deputy clerk. (Seal.) In the circuit court of the United States for the northern district of Florida. Fáber & Watt, executors of James Symington, *vs.* Anderson, administrator of E. J. Wilson, Thos. E. Wilson *et al.* In equity. Exhibit B to the bill of complaint. Filed Aug. 25th, 1885. Philip Walter, clerk. A. W. Cockrell & Son, solicitors for complainants.

13 The people of the State of New York to all to whom these presents shall come or may concern send greeting:

Know ye that we, having inspected the records of our surrogate's court in and for the county of New York, do find that on the 29th day of October, in the year one thousand eight hundred and seventy-seven, by said court letters testamentary on the estate of James Symington, late of the city of New York, deceased, were granted and committed unto Gustavus W. Faber and James S. Watt, the executors named in the last will and testament of said deceased, and that it does not appear by said records that said letters have been revoked.

In testimony whereof we have caused the seal of the surrogate's court to be hereunto affixed. Witness Daniel G. Rollins, surrogate of our said county, at the city of New York, the [SEAL.] 26th day of October, in the year of our Lord one thousand eight hundred and eighty-three.

AUSBURN M. DICKINSON.
Clerk to the Surrogate's Court.

Endorsement: In the circuit court of the United States for the northern district of Florida. Faber & Watt, executors of James Symington, *vs.* (in equity) Anderson, adm'r of E. J. Wilson; Thos. E. Wilson, *et al.* Exhibit C to the bill of complaint. Filed Aug. 25, 1885. Philip Walter, clerk. A. W. Cockrell & Son, solicitors for complainants.

14 UNITED STATES OF AMERICA, }
Northern District of Florida. }

The President of the United States of America to J. C. Anderson, adm'r of the estate of Edward J. Wilson; Thomas Emmett Wilson, and Sarah J. Davis, citizens and residents of the northern dist. of Florida:

We command you and every of you that you appear before the judges of the circuit court of the United States of America for the fifth circuit and northern district of Florida, at Jacksonville, in said district, on the first Monday, being the 5th day, of October next, to answer to a bill of complaint exhibited against you by Gustavus W. Faber and James S. Watt, citizens and residents of the State of New York, executors of the last will of James Symington, deceased, late of New York, and filed in the clerk's office of said court, and then and there to receive and abide by such judgment and decree as said court shall have considered in this behalf; and this you are not to omit upon pain of judgment by default being pronounced against you.

To the marshal of the United States to execute and return.

Witness the Honorable Morrison R. Waite, Chief Justice [SEAL.] of the Supreme Court of the United States, and the seal of this court, at the city of Jacksonville, in said district, this 25 day of August, A. D. 1885.

PHILIP WALTER, *Clerk.*

A. W. COCKRELL & SON,
Solicitors for Compl'ts.

MEMORANDUM.—The above-named defendants are notified that unless they shall enter their appearance in the clerk's office of said court, at Jacksonville aforesaid, on or before the day to which the above is returnable the complaint will be taken against them as confessed and a decree entered accordingly.

PHILIP WALTER, *Clerk.*

14½ [Endorsed:] No. —. Circuit court United States, northern district of Florida. Faber & Watt *vs.* J. C. Anderson *et al.* Chancery subpœna. Returnable to rule day, first Monday in ——, A. D. 188–. —— ——, clerk. Filed Sep. 7, A. D. 1885. Philip Walter, clerk. A. W. Cockrell & Son, complainants' solicitors.

Received the original Aug. 25 & executed the same as to J. C. Anderson, one of the defendants, by delivering to him in person a true copy hereof & at the same time exhibiting the original, at Orlando, Orange Co., Fla., this 3rd Sept., A. D. 1885.

W. C. BIRD,
U. S. Marshal.

I hereby deputize & appoint T. L. Anderson, of Orange county, a special deputy to serve the within writ and make due return of the same.

Sept. 3, 1885.

W. C. BIRD,
U. S. Marshal.

Rec'd this writ on Sept. 4*rd*, A. D. 1885, and served the same on the within-named Thomas Emmett Wilson & Sarah J. Davis by delivering a true copy to each one personally & exhibiting the original to them this 4th day of Sept., A. D. 1885.

T. L. ANDERSON,
Special Deputy U. S. M.

15 In the Circuit Court of the United States for the Northern District of Florida. In Chancery.

G. W. FABER and JAMES S. WATT, as Executors, &c., of the Estate of James Symington, Deceased,
vs.
J. C. ANDERSON, Administrator; GEO W. DAVIES, SARAH J. DAVIES, and THOS. E. WILSON.

The clerk of the circuit court of the United States for the northern district of Florida will please enter our appearance in the above-entitled cause for the defendants.

FLEMING & DANIEL,
Solicitors for Defendants.

October 26, 1885.

Endorsement: In the circuit court of the United States, northern district of Florida. Faber & Watt, as ex'rs, &c., of James Syming-

ton, dec'd, *vs.* Geo. W. Davies, Sarah J. Davies, & T. E. Wilson. Appearance. Filed Oct. 26, 1885. Philip Walter, clerk. Fleming & Daniel, att'ys for def'ts.

16 In the Circuit Court of the United States, Northern District of Florida.

GUSTAVUS W. FABER and JAMES S. WATT, as Executors of the last Will and Testament of James Symington, Deceased,
vs.
J. C. ANDERSON, as Adm'r of Edward J. Wilson, Deceased; THOMAS EMMET WILSON, and SARAH J. DAVIS.

The demurrer of J. C. Anderson, as administrator of Edward J. Wilson, deceased; Thomas Emmet Wilson, defendants, to the bill of complaint of Gustavus W. Faber and James S. Watt, as executors of the last will and testament of James Symington, deceased, plaintiffs.

These defendants, by protestation, not confessing all or any of the matters and things in the plaintiffs' bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show:

1st. That said bill does not sufficiently show the authority of complainants to bring this suit as the executors of James Symington, deceased.

2nd. That the certificate of the clerk of the surrogate court of the city and county of New York attached to said bill is not in conformity with the statute.

3rd. That it appears by the mortgage attached to said bill that said mortgage was given as "additional security," and it does not appear that the security to which said mortgage was addi-
17 tional has been exhausted.

Wherefore, and for divers other causes of demurrer appearing in the said bill, the defendants do demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

We hereby certify that in our opinion the foregoing demurrer is well founded in law.

FLEMING & DANIEL.

STATE OF FLORIDA,
County of Duval,

Before me personally appeared Thomas E. Wilson, to me well known, and, being duly sworn, says that he is one of the defendants in the above-entitled cause, and that he has read the foregoing demurrer and knows the contents thereof, and that the said demurrer is not interposed for delay.

THOS. EMMET WILSON.

Sworn to and subscribed before me this 20th day of November, A. D. 1885, at Jacksonville, Florida.

J. W. BARRS,
Notary Public, State of Florida at Large.

Endorsement: In the circuit court of the United States, northern district of Florida. Gustavus W. Faber and James S. Watt, as ex's of the last will and testament of Jas. Symington, deceased, *vs.* J. C. Anderson, as adm'r of Edw. J. Wilson, dec'd; Thos. Emmet Wilson, and Sarah J. Davis. Demurrer of J. C. Anderson, as adm'r, &c., and Thomas Emmet Wilson. Filed Dec. 7, 1885. Philip Walter, clerk. Fleming & Daniel, def'ts' sol's.

18 In the Circuit Court of the United States, Northern District of Florida.

GUSTAVUS W. FABER and JAMES S. WATT, as Executors of the Last Will and Testament of James Symington, Deceased,
vs.
J. C. ANDERSON, as Adm'r of Edward J. Wilson; Deceased, THOMAS EMMET WILSON, & SARAH J. DAVIES.

The plea of Sarah J. Davies, one of the defendants, to the bill of complaint of Gustavus W. Faber and James S. Watt, as executors of the last will and testament of James Symington, deceased, plaintiffs.

This defendant, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of the said bill, says:

1st. That the said G. W. Faber and James S. Watt were not, as by them alleged in their said bill of complaint, at the time of the filing thereof, the executors, administering the estate of the said James Symington, but that the said G. W. Faber and James S. Watt previous to the date of the filing of said bill, to wit, on or about the 9th day of May, 1884, were discharged by order of the surrogate court for the county of New York, in the State of New York, as such executors, and had wholly ceased thereafter to have or exercise any right or authority as executors of the said last will and testament.

19 2nd. That this defendant, before and at the time of the filing of said bill, was and now is under the coverture of one Geo. W. Davis, who is still living, to wit, in the city and State of New York.

All which matters and things this defendant doth aver to be true, and pleads the same to the said bill of complaint, and prays the judgment of this honorable court whether she should be compelled to make any other or further answer to the said bill, and prays to be hence dismissed with her costs and charges in that behalf most wrongfully sustained.

FLEMING & DANIEL,
Solicitors for Defendants.

STATE OF FLORIDA, }
County of Orange. }

Before me personally appeared Sarah J. Davies, to me well known, who, being duly sworn, says that she is one of the defendants in the above-entitled cause; that she has read the foregoing plea and knows the contents thereof, and that to the best of her knowledge, information, and belief the said plea is true in point of fact.

SARAH J. DAVIS.

Sworn to and subscribed to before me this 30th day of November, A. D. 1885.

F. P. FORSTER, [SEAL.]
Notary Public.

Endorsement: In the circuit court of the United States, northern district of Florida. Gustavus W. Faber and James S. Watt, as ex's of the last will and testament of Jas. Symington, dec'd, *vs.* J. C. Anderson, as adm'r of Edw. J. Wilson, dec'd; Thos. Emmet Wilson, & Sarah J. Davies. Plea of Sarah J. Davis, one of the def'ts. Filed Dec. 7, 1885. Philip Walter, clerk.

20 In Cir. Court U. S., N. Dis. of Fla.

G. W. FABER and JAMES S. WATT, Ex'rs, &c., }
vs.
J. C. ANDERSON, Adm'r, *et al.* }

The plea of Sarah J. Davies, one of the defendants, and the demurrer of J. C. Anderson, adm'r, and Thomas Emmett Wilson are severally set down for hearing.

Said matters will be called up for hearing on the 31st day of December, 1885, or as soon thereafter as counsel can be heard.

A. W. COCKRELL & SON,
Solicitors for Complainants.

Endorsement: In cir. court U. S., N. dist. of Florida. G. W. Faber *et al. vs.* J. C. Anderson *et al.* Setting down demurrer & plea for hearing. Filed Dec. 26, 1885. Philip Walter, clerk. A. W. Cockrell & Son, sol's for complainants.

21 In the Circuit Court of the U. S., Northern District of Florida

GUSTAVUS W. FABER and JAMES S. WATT, Ex'rs, &c., }
vs.
J. C. ANDERSON, as Adm'r of Ed. J. Wilson, Dec'd; THOMAS EMMETT WILSON, & SARAH J. DAVIES. }

The demurrer of J. C. Anderson, as administrator of E. J. Wilson dec'd, and Thomas Emmett Wilson being argued before the court by the solicitors of the respective parties, and the 1st and 2nd point of the demurrer being confessed and a substituted certificate having been this day filed to meet said points—

It is ordered that the other grounds of demurrer be, and the same are hereby, overruled and the demurrants allowed until the rule day in March to answer the bill in this case.

Feb. 11, 1886.

(Signed) THOMAS SETTLE, *Judge.*

Endorsement: Filed Feb. 11, 1886. Philip Walter, clerk.

22 The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, greeting:

Know ye that we, having examined the records and files in the office of the surrogate of the county of New York, do find a certain last will and testament of James Symington, deceased, together with the probate thereof and letters granted thereon, there remaining in the words and figures following, to wit:

Be it remembered that heretofore, to wit, on the third day of October, in the year one thousand eight hundred and seventy-seven, James Lymington and James S. Watt, the executors named in the last will and testament of James Symington, late of the county of New York, deceased, appeared in open court before Delano C. Calvin, surrogate of the county of New York, and made application to have the said last will and testament, which relates to both real and personal estate, proved; and on such application the surrogate did ascertain by satisfactory evidence who were the only heirs and next of kin of said deceased and their respective residences; and said surrogate did thereupon issue a citation, directed to said only heirs and next of kin by their respective names, stating their places of residence, requiring them to appear before said surrogate, at his office in the city of New York, on the nineteenth day of October then next, to attend the probate of said will, on which day, it appearing that some of the parties in interest had not been properly served, a new citation was issued, returnable on the twenty-ninth day of October, one thousand eight hundred and seventy-seven, on

23 which day satisfactory evidence by affidavit was adduced and presented to said surrogate of the service of said citation in mode prescribed by law. It being ascertained on the said day or before any proceedings were taken upon the said will that some of the parties were minors having no general guardian residing in the State of New York, a special guardian was appointed in due form of law to take care of their interests in the matter of proving said will by an order duly issued for that purpose by said surrogate, and said special guardian having duly appeared on that day, no one appearing to oppose the probate of said will, such proceedings were thereupon had afterwards that said surrogate took the proofs of said will hereafter set forth, and upon this twenty-ninth day of October, in the year one thousand eight hundred and seventy-seven, he adjudged said will to be a valid will of real and personal estate and the proofs thereof to be sufficient, which said last will and testament and proofs are as follows—that is to say:

In the name of God, amen. I, James Symington, of the city of

New York, merchant, being of sound and disposing mind and memory and mindful of the uncertainty of human life, do make, publish, and declare this my last will and testament in manner following—that is to say:

First. I direct my executors hereinafter named and the survivors and survivor of them to pay all my just debts.

Item. I declare it to be my will and intention that all my estate, both real and personal, of whatsoever nature or kind and wheresoever situate, whereof I am now seized and possessed or whereof I may be seized and possessed at the time of my death shall pass under and by virtue of this my last will and testament.

Item. All my estate, both real and personal, of whatsoever nature or kind or wheresoever situate, which I now own or hereafter may acquire or which I may be seized or possessed of at the time of my death I give, bequeath, and devise to my said executors hereinafter named and to the survivors and survivor of them; to have and to hold the same to them and to the survivors and survivor of them forever, upon the trusts, nevertheless, and upon the uses, intents, and purposes and with the powers hereinafter mentioned and declared of and concerning the same—that is to say:

In trust to enter upon and take possession of said real and personal estate and every part and parcel thereof and to divide the same into as many equal shares as may be the number of my children living at the time of my death and that may have died before that time leaving children surviving, and to pay over to any of my said children who at the time of my death may be of lawful age the share that may be so set apart for such child, and to have and to hold for each of my said children who at the time of my death may be an infant the share that may be set apart for such child and to invest the same on bond and mortgage, New York city or State bonds, and to have, take, collect, and receive the rents, issues, income, and profits thereof, and to pay over and apply the same to the use of the child for whom such share may be set apart as aforesaid until such child shall arrive at the age of twenty-one years, and on that event then to pay over the same to it; and it is my will and intention that if at the time of the division of my estate to be made as aforesaid any of my said children shall have died leaving children surviving the child or children of any child so dying shall represent and take the share to which its parent would have been entitled if alive at the time of such division, and in case any of my said children shall die before arriving at the age of twenty-one years, without leaving a child or children surviving, then I direct that the share to which said child so dying would have been entitled if alive at the time of such division shall be distributed among my surviving children and the children of such of my children as may have died leaving issue share and share alike, *per stirpes* and not *per capita*.

Item. To enable my executors hereinafter named and the survivors and survivor of them to carry into effect the purposes of this my last will and testament, I hereby authorize and empower my said executors and the survivors and survivor of them in their or his discretion to sell, either at public auction or private sale, and

for either for cash or on credit, or partly for cash and partly on credit, all of my said real estate or any part thereof, and to have and to hold the proceeds of the sale of the said real estate or any part thereof, and divide and distribute and invest and reinvest the same upon the trusts hereinbefore mentioned.

Item. I hereby nominate and appoint my son James and my friend, Gustavus W. Faber, of the city of New York, merchant, and James S. Watts, merchant, Brooklyn, Long Island, and the survivors and survivor of them, executors and trustees under this my
26 last will and testament, and I hereby also appoint my said executors guardians of the persons and estates of my said children and each of them, and I hereby revoke all other and former wills and testaments made by me.

In witness whereof I have hereunto set my hand and seal this twenty-seventh day of March, in the year of our Lord one thousand eight hundred and seventy-five.

JAMES SYMINGTON. [L. S.]

The above instrument in writing was at the date thereof signed, sealed, and published and declared by the said testator, James Symington, to be his last will and testament in the presence of each of us, who, at his request and in his presence and in the presence of each other, have respectfully subscribed our names as attesting witnesses to the execution of said last will and testament.

GERTRUDE L. C. D'HUMICRES, *New York.*
CHAS. T. GOADBY,
21 *West 35th St., New York City.*

27 Surrogate's Court, County of New York.

In the Matter of Proving the Last Will and Testament of JAMES SYMINGTON, Deceased, as a Will of Real and Personal Estate.

Examination of witnesses sworn and examined in the above-entitled matter, to wit:

CHARLES F. GOADBY, of New York city, being duly sworn as a witness in the above-entitled matter and examined on behalf of the applicant to prove said will, says: I was well acquainted with James Symington, now deceased; I knew the above-named decedent for fifteen years before his death. The subscription of the name of said decedent to the instrument now shown to me and offered for probate as her last will and testament and bearing date the twenty-seventh day of March, in the year one thousand eight hundred and seventy-five, was made by the decedent at the city of New York in the presence of myself and Gertrude L. C. d'Humieres, the other subscribing witness. At the time of such subscription the said decedent declared the said instrument so subscribed by him to be his last will and testament; and I thereupon signed my name as a witness at the end of said instrument, at the request of said decedent and in his presence.

The said decedent, at the time of so executing said instrument,

was upwards of the age of twenty-one years and of sound mind, memory, and understanding and not under any restraint or in any respect incompetent to devise real estate. I also saw said G.
28 L. C. d'Homicres, the other attesting witness, sign her name as a witness at the end of said will, and know that she did so at the request of said decedent and in his presence.

CHAS. F. GOADBY.

Sworn this 29th day of October, 1877, before me—
DELANO C. CALVIN, *Surrogate.*

Surrogate's Court, County of New York.

In the Matter of Proving the Paper Propounded as the Last Will and Testament of JAMES SYMINGTON, Deceased, as a Will of Estate.

Examination of Witnesses Sworn and Examined in the Above-Entitled Matter.

COUNTY OF NEW YORK, *To wit:*

29 ALEXANDER B. CRANE, of Scarsdale, New York, being duly sworn as a witness in the above-entitled matter and examined on behalf of the petitioner to prove said will, says that he was well acquainted with James Symington, late of the city of New York, and with his manner and style of handwriting, having often seen him write, and that he verily believes that the signature James Symington subscribed as testator to the instrument in writing now produced and shown to deponent, purporting to be the last will and testament of said deceased, bearing date the twenty-seventh day of March, in the year one thousand eight hundred and seventy-five, is the proper signature and handwriting of James Symington, dec'd.

A. B. CRANE.

Sworn this 29th day of Oct., 1877, before me—
DELANO C. CALVIN, *Surrogate.*

Surrogate's Court, County of New York.

In the Matter of Proving the Paper Propounded as the Last Will and Testament of JAMES SYMINGTON, Deceased, as a Will of Estate.

30 *Examination of Witnesses Sworn and Examined in the Above-Entitled Matter.*

COUNTY OF NEW YORK, *To wit:*

HORACE B. KELLY, of New Brighton, L. I., being duly sworn as a witness in the above-entitled matter and examined on behalf of the petitioner to prove said will, says that he is well acquainted with Gertrude L. C. d'Homicres, formerly of the city of New York, and with her manner and style of handwriting, having often seen her

write, and that he verily believes that the signature Gertrude L. C. d'Homieres, subscribed as a witness to the instrument in writing now produced and shown to deponent, purporting to be — last will and testament of said deceased, bearing date the twenty-seventh day of March, in the year one thousand eight hundred and seventy-five, is the proper signature and handwriting of said Gertrude L. C. d'Homieres; that said Gertrude L. C. d'Homieres is not now in the State of New York, but resides at Aurillas, Republic of France.

HORACE B. KELLY.

Sworn this 29th day of Oct., 1877, before me—

DELANO C. CALVIN, *Surrogate.*

31 At a surrogate's court held in and for the county of New York, at the surrogate's office, in the city of New York, on the 29th day of Oct., in the year 1877.

Present: Delano C. Calvin, Esq., surrogate.

In the Matter of Proving the Last Will and Testament of JAMES SYMINGTON, Deceased.

The citation in this matter having been duly issued, served, and returned, such proceedings were thereupon had that the proofs were duly taken, and the allegations of the parties appearing having been heard—

It is decided, ordered, adjudged, and decreed that the instrument offered for probate in this matter is the last will and testament of the said testator, and as such is valid as a will of real and personal estate, and the same is hereby admitted to probate as a will of real and personal estate.

D. C. CALVIN, *Surrogate.*

32 COUNTY OF NEW YORK, *ss:*

Recorded the preceding last will and testament of James Symington, deceased, as a will of real and personal estate, together with the proofs and examinations taken and had in the court of the surrogate of the county of New York relating to the said last will and testament; which said record is hereby signed and certified by me, pursuant to the provisions of the Revised Statutes and of chapter 274 of the Laws of 1877, the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

PETER V. BURTSELL,
Clerk to the Surrogate's Court.

33 The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or whom they may concern send greeting:

Know ye that at the county of New York, on the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, before Delano C. Calvin, Esq., surrogate of our said county, the last will and testament of James Symington, de-

ceased, was proved, and is now approved and allowed by us, and the said James Symington being at or immediately at or previous to his death an inhabitant of the county of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels, and credits of the said testator, and also the auditing, allowing, and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels, and credits of the said deceased and anyway concerning his will is granted unto Gustavus W. Faber, of the city of New York, and James S. Watt, of Brooklyn, N. Y., executors in the said will named, they being first duly sworn well, faithfully, and honestly to discharge the duties of such executors.

In testimony whereof we have caused the seal of office of our said surrogate's court to be hereto annexed.

Witness Daniel G. Rollins, Esq., surrogate of our said county, at the city of New York, the 29th day of Oct., in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second.

[L. S.] D. C. CALVIN, *Surrogate.*

34 All which we have caused by these presents to be exemplified and the seal of our said surrogate's court to be hereunto affixed.

Witness Daniel G. Rollins, surrogate, at the city of New York, the sixth day of January, in the year of our Lord one thousand eight hundred and eighty-six, — of our Independence the one hundred and tenth.

[SEAL.] AUSBURN M. DICKINSON,
Clerk of the Surrogate's Court.

I, Daniel G. Rollins, surrogate of said county and presiding magistrate of the surrogate's court, do hereby certify that Ausburn M. Dickinson, whose name is subscribed to the preceding exemplification, is the clerk of the said surrogate's court of the county of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said surrogate's court, and that the attestation thereof is in due form.

Dated New York, Jan'y 6th, 1886.

DAN G. ROLLINS, *Surrogate.*

STATE OF NEW YORK, } ss.:
City and County of New York, }

I, Ausburn M. Dickinson, clerk of the surrogate's court of the county of New York, do hereby certify that Daniel G. Rollins, whose name is subscribed to the preceding certificate, is the presiding magistrate of the surrogate's court of the county of New York, duly
35 elected, sworn, and qualified, and that the signature of said magistrate to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 6th day of Jan'y, 1886.

[SEAL.] AUSBURN M. DICKINSON,
Clerk of the Surrogate's Court.

Endorsement: Surrogate's court, county of New York. In the matter of the estate of James Symington, deceased. Exemplified copy of will, &c. Filed Feb. 11, 1886. Philip Walter, clerk.

36 In the United States Circuit Court, 5th Jud. Cir., North. Dist. of Fla.

FABER & WATT, Executors, *vs.* J. C. ANDERSON, Adm'r, *et al.* } Bill to Foreclose Mortgage.

It is ordered by and between solicitors for complainants and defendants that the time for the filing of the answer or answers of Anderson, administrator, and Thos. E. Wilson be extended to the second Monday in March, and if not filed on that day that complainants be entered a decree *pro confesso* as taken under the rules as of the first Monday of March inst.

March 1, 1886.

A. W. COCKRELL & SON,
Sol's for Complainants.
FLEMING & DANIEL,
Sol's for Anderson, Adm'r, & T. E. Wilson.

Endorsement: In United States circuit court, 5th judicial circuit, northern district of Fla. Faber & Watt, ex'rs, &c., *vs.* Anderson, adm'r. Agreement to extend time to March 8, 1886, for answer of Anderson, adm'r, &c. Filed Mar. 1st, 1886. Philip Walter, clerk.

37 In the Circuit Court United States, Northern District of Florida. In Equity.

GUSTAVUS W. FABER & JAMES S. WATT, as Ex'rs of the Last Will and Testament of James Symington, Dec'd, *vs.* J. C. ANDERSON, as Adm'r of Edward J. Wilson, Dec'd, *et al.*

In this cause it appearing to the court that the defendants herein, J. C. Anderson, as administrator of Edward J. Wilson, dec'd, and Thos. Emmet Wilson, have failed to answer the bill of complaint herein in the time prescribed by a decretal order of this court *entitled* herein on the 11th day of Feb'y, 1886, and are in default to this day, it is therefore, on motion of the solicitors of the complainants herein, ordered, adjudged, and decreed that said bill of complaint be, and the same hereby is, taken as confessed by and against the said James C. Anderson, as administrator of Edward J. Wilson, dec'd, and the said Thos. Emmet Wilson, defendants herein.

Endorsement: Filed Mar. 10, 1886. Philip Walter, clerk.

38 In the Circuit Court United States, Northern District of Florida. In Equity.

GUSTAVUS W. FABER & JAMES S. WATT, as Ex'rs of the Last Will & Testament of James Symington, Dec'd,
vs.
J. C. ANDERSON, as Adm'r of Edward J. Wilson, Dec'd, *et al.*

The defendants, J. C. Anderson, as administrator of Edward J. Wilson, dec'd, and Thos. Emmett Wilson, having failed to answer the bill in this cause in the time prescribed by the decretal order of this court entered herein on the 11th day of Feb'y, 1886, the clerk of this court will enter a decree *pro confesso* against said defendants.

A. W. COCKRELL & SON,
Solicitors for Complainants.

Endorsement: In the cir. court U. S., northern dist. of Florida. Gustavus W. Faber & James S. Watt, as ex'ors of the last will & testament of James Symington, dec'd, *vs.* J. C. Anderson, as adm'r of Edward J. Wilson, dec'd, *et al.* Præcipe for decree *pro confesso.* Filed Mar. 10, 1886. Philip Walter, clerk. A. W. Cockrell & Son, sol's for compl'ts.

39 In the Circuit Court of the United States for the Fifth Judicial Circuit, Northern District of Florida.

AUGUSTUS W. FABER and JAMES S. WATT, Executors of the Last Will and Testament of James Symington, Deceased,
vs.
J. C. ANDERSON, Administrator of the Estate of Edward J. Wilson, Dec'd; THOMAS EMMET WILSON.

The answer of the defendants, J. C. Anderson, adm'r of the estate of Edward J. Wilson, dec'd, and of Thomas Emmet Wilson, two of the defendants above named, to the bill of complaint exhibited against them by the complainants.

These defendants, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and imperfections in the said complainants' said bill of complaint contained, for answer thereto or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants, answering, say that in the year 1869, or perhaps 1868, one Charles E. Earnest, of Orange county, Florida, made a homestead entry of the southwest quarter of section 30, in township 19 S., of R. 30 E., from the Government of the United States, said land being Government land of said United States, situated in Orange county, Fla., and being at the time entirely wild and unimproved land, situated in the
40 woods about six miles west of what is now the town of Sanford; that said C. E. Earnest took possession of the said land in the

manner provided for by the homestead laws and regulations of the United States, lived upon the said land with his family, built a substantial house and some outbuildings thereon, cleared and fenced about ten (10) acres thereof, cultivated the same in corn and sugar cane and other crops, and planted about five (5) acres in orange trees; that said Earnest, at the time of taking possession of said land or soon thereafter, obtained a homestead receipt for the said land upon paying the fees prescribed by law, said homestead receipt being issued by the officer or officers in charge of the United States land office, then situated at Tallahassee, in the State of Florida.

That said C. E. Earnest, after obtaining said receipt, resided with his family upon the said land for a period of about eighteen (18) months, when he commuted for the said land in the manner prescribed by the statutes of the United States and paid for the same at the Government price—$1.25 per acre—and obtained his final receipt from the Government of the United States, through its land office, in the mode prescribed by the laws and regulations of said United States; that said quarter section of land was supposed to contain one hundred and sixty acres, but does actually contain between one hundred and forty-two and one hundred and forty-three acres.

That in the month of Dec., 1870, or in the year 1871, in the month of January or February, Edward J. Wilson came to Orange county, Fla., and met the said Charles E. Earnest and purchased from him
41 the said tract of land for a valuable consideration, to wit, $1,950.00, some time in the month of March of said year, and that the said Charles E. Earnest and Sallie L. Earnest, his wife, by deed dated the fifteenth day of March, A. D. 1871, conveyed said above-described tract of land to said Edward J. Wilson for the consideration of one thousand nine hundred and fifty dollars ($1,950.00); that said deed was duly recorded on the 28th day of November, 1876, in the county clerk's office of Orange county, Florida, and these defendants pray leave to refer thereto as often as may be necessary. These defendants, further answering, say that on the 22nd day of May, in the year A. D. 1871, the said Edward J. Wilson, for a valuable consideration, to wit, the sum of one thousand two hundred and fifty dollars ($1,250.00), conveyed to the defendant, Thomas Emmet Wilson, an undivided moiety or one-half part of the said above-described tract of land; that said deed was also duly recorded in the clerk's office of Orange Co., Fla., on the 11th day of September, A. D. 1875, and these defendants pray leave also to refer thereto as often as may be necessary. These defendants, further answering, say that the said Thos. Emmet Wilson went into the immediate possession of the said premises under said deed, and that from said 22nd day of May, 1871, to the present time, being nearly 15 years, the said Thos. E. Wilson and his grantee have been in the quiet, peaceable, and undisturbed possession of the said premises, claiming the same adversely to any other person.

These defendants, further answering, say that on the 28th day of August, A. D. 1875, nearly four years and a half after the defendant,

Thos. E. Wilson, had gone into the actual possession of said tract of land deeded to him by the deed of May 22nd, 1871, as aforesaid, and while said Thos. E. Wilson was in the actual possession of said premises, exercising all the acts incidental to full ownership
42 thereof under his said deed, the said Edward J. Wilson, his grantor, who was not in the actual possession of the said premises and whose residence and place of abode was in the city of New York, gave a mortgage to one James Symington, also of the city of New York, conditioned upon the failure of previous security, already given, for the sum of thirteen thousand dollars ($13,000.00); that said mortgage was given upon the southwest quarter of section thirty (30), in township nineteen (19) south, of range thirty (30), east, and thus embraced not only the undivided half interest that belonged to Edward J. Wilson, but also the undivided half interest of the defendant, Thos. E. Wilson, which had been deeded to him by said Edward J. Wilson four and a half years previously to the giving of said mortgage, and which said Thos. E. Wilson was at the time of the giving of the said mortgage in actual possession of and had been in the actual and peaceable possession of from the 22nd day of May, 1871, the said Edward J. Wilson thus mortgaging, without any authority from said Thos. E. Wilson and without his knowledge or consent, the undivided half interest of said Thos. E. Wilson in the said land; that said mortgage was filed in the clerk's office of Orange county, Fla., on the third day of May, A. D. 1876, and these defendants pray leave to refer thereto as often as may be necessary.

These defendants, further answering, say that some time after the defendant, Thos. E. Wilson, had taken possession of the said tract of land under the said deed from Edward J. Wilson, to wit, about one year thereafter it was discovered that, owing to a defalcation on the part of the register or receiver of the United States land office to whom the money had been paid by said C. E. Earnest in
43 obtaining his title to the land in question, there was some difficulty in obtaining the patent therefor, and the said Edward J. Wilson thereupon employed a person whom he deemed competent and faithful, and who was accustomed to the workings of the land office, to obtain the patent to the said land in order to make the said title complete, and that after a long time said person obtained the patent to the said land in the name of Edward J. Wilson, said Edward J. Wilson paying the Government price for the said land a second time, the said price having been paid the first time by said Charles E. Earnest, as heretofore set forth. The said patent was dated the 10 day of April, 1875, and was recorded in the clerk's office of Orange county, Florida, on the 24th day of November, 1879, and these defendants pray leave to refer to same as often as may be necessary.

These defendants, further answering, say that prior to the time of the giving of the said mortgage to said James Symington by said Edward J. Wilson the defendant, Thos. E. Wilson, had advanced a large sum of money, to wit, the sum of about three thousand dollars ($3,000.00), for the benefit of said S. W. ¼ of sec. 30, T. 19 S., of R. 30 E., over and above his share under the agreement between him

and said Edward J. Wilson, in taking care of, cultivating, and setting out orange trees and improving the said premises with a view to making the same yield a revenue and in accordance with the wish of his tenant in common, said Edward J. Wilson, who, as well as said Thos. E. Wilson, desired to make an orange grove thereon and get the same into bearing as soon as possible for the benefit of both; and these defendants claim that before the said Edward J. Wilson could mortgage his own undivided half interest in the tract described he was bound legally to pay his portion of
44 the sums advanced by said Thos. E. Wilson, and in default thereof that the undivided half interest of said Edward J. Wilson was liable therefor; that such advances were a prior lien on the share of said Edward J. Wilson in the said premises, of which the said James Symington was bound to take notice, as the said Thos. E. Wilson was in the actual and sole possession and control of the said premises at the time of the giving of the said mortgage. These defendants, further answering, say that in the spring of the year 1876, in the month of April, the said Edward J. Wilson died in the city of New York.

These defendants, further answering, say that the taxes upon the undivided half interest belonging to the estate of said Edward J. Wilson were not paid for the years 1876 and 1877; that the defendant, Thos. E. Wilson, declined to have anything to do with the affairs of the said estate, and so did all of the heirs and devisees, and that the said James Symington took no steps to avail himself of any rights by virtue of the said mortgage to any interest in the undivided half of the said land belonging to the estate of the said Edward J. Wilson, but that said mortgage was totally ignored, and that no steps were taken nor anything done to show that said James Symington or any one who represented him claimed anything by virtue of the said mortgage or to show that the prior security named in the said mortgage had not been sufficient to fully satisfy all demands due the said James Symington by said Edward J. Wilson; that during the month of December, 1877, the undivided half interest of the estate of the said Edward J. Wilson in said S. W. ¼ of sec. 30, T. 19 S., of R. 30 E., was duly advertised for sale for taxes for the years 1876 and 1877, and on the 8th day of Jan'y, A. D. 1878, said premises were sold by Nat. Pointz, collector of rev-
45 enue for Orange county, Florida, for the non-payment of taxes for the years 1876 and 1877 to the highest bidder; that at said sale said Thos. E. Wilson became the purchaser, he being the best bidder therefor; that no redemption of the said property was made or attemptad by the said James Symington or any other person, and on the 16th day of January, 1879, over a year from the date of said sale, said Thos. E. Wilson received a deed of said undivided half interest of S. W. ¼ of sec. 30, T. 19 S., of R. 30 E., from James P. Hughey, county clerk of Orange county, Florida, in accordance with the statutes of said State.

That said deed was duly recorded in the office of the county clerk of Orange county, Florida, on the 16th day of January, 1879, and these defendants pray leave to refer thereto as often as necessary.

These defendants, further answering, say that said Thos. E. Wilson immediately took full and complete possession of the said premises, claiming that the said tax deed gave him a full and complete title to the undivided one-half interest that belonged to the estate of the said Edward J. Wilson relieved from all liens or encumbrances that existed against said undivided one-half interest, and that said Thos. E. Wilson and his grantee, after he sold said premises, have remained in the full, quiet, peaceable, and unquestioned possession of said undivided one-half interest from the time of the recording of the said tax deed, on January 16th, 1879, to the present time. These defendants, further answering, say that no suit or proceeding has been commenced by any former owner or claimant, his heirs or assigns or his or their legal representatives, to set aside the deed made to said Thos. E. Wilson in pursuance of the sale of said land for taxes or against said Thos. E. Wilson to recover the possession
46 of said land, although the space of over seven years has now elapsed, and that said Thos. E. Wilson and his grantee have been in the actual and undisturbed possession of the said premises from said 16th day of January, 1879, to the present time. These defendants, further answering, say that from the spring of the year 1873 to the fall of the year 1879 the entire burden of the said property had fallen upon said Thos. E. Wilson; that he was obliged to pay out considerable sums of money from his private funds for the care and preservation thereof.

That he devoted a large part of his time to the superintendence thereof, and labored personally upon the same when necessary; that he was obliged to keep workmen and horses in order to care properly for the said property—to put up proper buildings for them, to buy fertilizers for the grove, and to provide each and every article and implement necessary to run the place; that this outlay was constant and continuous, and any cessation thereof would have resulted in serious injury to the value of the said property and serious loss to said Thos. E. Wilson; that said Thos. E. Wilson had expended, as previously stated, the sum of about three thousand ($3,000.00) dollars on the said property more than he was bound to expend by the agreement he had made with said Edward J. Wilson in advances made for the benefit of said property prior to the time when said Edward J. Wilson gave the mortgage to said James Symington; that the interest possessed in said property by said Thos. E. Wilson was such that he could not afford the loss incident to the neglect thereof, and therefore he continued to care for, cultivate, and improve the said property as became necessary in order to keep up the value thereof, and that from the time of the giving of the
47 said mortgage by said Edward J. Wilson to January, 1879, said Thos. E. Wilson had expended the further sum of about three thousand ($3,000.00) dollars upon the said property for the benefit thereof.

These defendants, further answering, say that on the 13th day of October, 1879, Thos. E. Wilson sold the said S. W. ¼ of sec. 30, T. 19 S., of R. 30 E., to Sarah J. Davis, wife of George W. Davis, of the city of New York, who has been made a party defendant herein,

for the sum of eight thousand dollars ($8,000.00), and by deed dated on that day conveyed to said Sarah J. Davis the said premises in fee simple, which deed was duly recorded in the office of the county clerk of Orange county, Florida, November 24th, 1879, and these defendants ask leave to refer thereto as often as may be necessary; that said Sarah J. Davis paid the sum of two thousand ($2,000.00) dollars in cash for the said land and gave said Thos. E. Wilson a purchase-money mortgage for six thousand ($6,000.00) dollars, dated Oct. 13, 1879, and rec. Oct. 24, 1879, and referred to as above.

That said Sarah J. Davis immediately went into the actual possession of the said land and has continued in the actual possession of the same from that time to the present time without interference or interruption from any source relating to her title thereto until the filing of complainants' bill and without the knowledge that said James Symington or his representatives claimed any sum due them for which said land was liable until January 1st, 1884; that she had expended prior to that time large sums of money in the improvement of the said property, had cleared additional land and planted the same in orange and other choice fruit trees, had continued to bring forward the orange grove that was upon the property when she purchased the same and had brought said
48 grove into bearing; that she had a large area, to wit, about thirty or forty acres, in orange and other fruit trees and under improvement; that she had rebuilt the fences, enclosing the entire tract with a strong and substantial fence, had built a barn, and had erected one of the finest dwellings in Orange Co. on the said premises; had laid out gardens and drives, built a wharf on the lake, and in all respects so improved the said property *so* to render it one of the finest in said county; that in making these improvements she had expended the sum of over twenty thousand ($20,000.00) dollars on the said premises in addition to the sum of two thousand ($2,000.00) dollars paid to said Thos. E. Wilson; that said Sarah J. Davis still owns the said premises and resides thereon.

These defendants, further answering, say that on the 31st day of December, 1883, said Thos. E. Wilson assigned to Mary F. Wilson an interest in his said purchase-money mortgage as security for the sum of three thousand ($3,000) dollars previously loaned him by said Mary F. Wilson, and that on the 1st day of June, 1884, he assigned a further interest in his said mortgage to the said Mary F. Wilson to cover a new loan of one thousand ($1,000.00) dollars; that said assignments were duly recorded in the office of the county clerk of Orange county, Florida, January 3rd, 1884, and June 18th, 1884, respectively, and these defendants pray leave to refer thereto when necessary.

These defendants, further answering, say that on the — of January, A. D. 1884, the defendant, Sarah J. Davis, and George W. Davis, her husband, mortgaged the said land to the firm of A. Appleton & Co., of the city of New York, for the sum of fifteen thousand ($15,000.00) dollars in order to secure them in an indebtedness of said George W. Davis to the firm; that said mortgage was

49 duly recorded in the clerk's office of Orange county, Florida, on the — day of Jan'y or Feb'y, 1884.

These defendants, further answering, say that, owing to the nature of the property and the rapidity with which such property deteriorates in value if the same is neglected, the defendant, Sarah J. Davis, had been obliged to spend in the care and cultivation of the same and the insurance on the house a large sum of money since Jan. 1st, 1884, and that she has expended upon the said property from that date to the present time the sum of three thousand ($3,000.00) dollars or more above the amount of the income of the said property in taking care of the same.

These defendants, further answering, say that at the time Edward J. Wilson gave the said mortgage to said James Symington on the S. W. ¼ of sec. 30, T. 19 S., R. 30 E., to wit, on August 28th, 1875, he was not the owner thereof, and had no right or authority to give the same; that his only interest in said property was an undivided half interest in said property, and said half interest was subject to and liable for the advances made for the benefit of the joint property by said Thos. E. Wilson; that said James Symington had full and ample notice of the rights of said Thos. E. Wilson from his open and notorious and sole possession of said property, exercising full and entire control thereof at the time of the giving of said mortgage and for years prior thereto and after; that said Edward J. Wilson at the time of giving said mortgage had no evidence of title to the said land in his possession and no evidence of title of record in said county of Orange; that the deed from said Charles E. Earnest was in the possession of said Thos. E. Wilson and not recorded; that
50 the patent to Edward J. Wilson was in the possession of the Government of the United States, and was not delivered until several months after the giving of the said mortgage, to wit, in November, 1875, and that the deed from Edward J. Wilson to Thos. E. Wilson was recorded before said patent was delivered and while the same was in the possession of the officers of the Government of the United States and within six months from the date of said patent, and that said mortgage to said James Symington was not recorded within six months from the execution thereof and not until the 3rd day of May, 1876, and after the death of said Edward J. Wilson, and that said Thos. E. Wilson had no notice of the giving of said mortgage, and did not know of the same until after he had recorded his said deed from Edward J. Wilson.

These defendants, further answering, say, on information and belief, that their long and continuous actual possession of the said premises by virtue of the tax deed of January 16, 1879, without interruption, suit, or effort made to redeem the said property or set aside said deed by any person or persons whomsoever, has, under the statutes and decisions of the State of Florida, given them an absolute title to the undivided half of said S. W. ¼ of sec. 30, T. 19 S., of R. 30 E., conveyed by said deed to said Thos. E. Wilson, and that the complainants are barred by the limitation of said statute from attacking said deed or attempting to set aside the same, and that said tax deed, under the statute and decisions of said State, con-

veys the title relieved of all incumbrances and liens against the property conveyed, the State tax constituting a prior lien to all others. These defendants therefore claim absolute title to the said property relieved from any liability for the said mortgage.

51 These defendants, further answering, say that the said mortgage from Edward J. Wilson to James Symington was given, as appears therein, as "additional security," and that the complainants' bill does not show that the property upon which the indebtedness of Edward J. Wilson to said James Symington was secured, before the giving of said "additional security," has ever been resorted to or any effort has been made to collect the said indebtedness or any part thereof from said property, and on information and belief these defendants say no proceedings in foreclosure or otherwise have been taken to make the first security liable for said indebtedness or any part thereof or to collect the same therefrom, nor has any interest ever been demanded on said mortgage, and they claim that said neglect to make any effort to collect said indebtedness from said property and the fact that no effort was ever made to collect said mortgage from any source nor any demand of interest made as due thereon from Aug. 28th, 1875, to Aug. 25th, 1885, a period of ten (10) years, furnishes a legal presumption of the payment thereof which cannot be rebutted.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged; without this, that there is any other matter, cause, or thing in the said complainants' bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their

52 reasonable costs and charges in this behalf most wrongfully sustained.

FLEMING & DANIEL,
Sol's for Defendants.

STATE OF FLORIDA, }
County of Orange. }

On this day personally came before me Thos. E. Wilson, who, being duly sworn, says that the contents of the foregoing bill are true when stated of his own knowledge, and those stated on information and belief he believes to be true.

THOS. E. WILSON.

Sworn to and subscribed before me this 26th Feb., 1886.
STEPHEN E. FOSTER,
Notary Public.

Endorsement: In the circuit court of the United States for the fifth circuit, northern dist. of Fla. Augustus W. Faber & J. S. Watt, ex'rs of James Symington, dec'd, *vs.* J. C. Anderson, adm'r of E. J.

Wilson, dec'd; Thomas Emmet Wilson & Sarah J. Davis. Answer of J. C. Anderson & Thos. Emmet Wilson. Filed Mar. 15, 1886. Philip Walter, clerk.

53 In the United States Circuit Court, Fifth Judicial Circuit, Northern District of Fla. In Chancery.

FABER & WATT, Executors of Symington,
vs.
THOMAS E. WILSON *et al.*

Before me, Philip Walter, clerk of the said court, personally appeared L. I. Fleming, who, being duly sworn, says that the answer of Thos. E. Wilson and J. C. Anderson, adm'r, was prepared, sworn to, and ready for filing in the office of Fleming & Daniel several days before the second Monday in March last and as early as the third day of that month; that it was his intention to file the said answer on or before the said second Monday in March; that the said answer was taken to the office of the clerk of the circuit court, as this affiant believes, at the time or before the said second Monday in March and left there.

That he is taken by surprise finding that the said answer has the file-mark of the 15th of March, and that if the fifteenth was the day on which the said answer was by him left at the clerk's office it was owing to the fact that this affiant by oversight and mistake regarded that day as the second Monday in the month; that at the time he was mindful of the fact that he was under agreement with the counsel for complainants to have said answer filed on or before the said second Monday in March, and when the answer was taken to the clerk's office he felt assured that it was in time to meet the time of the agreement.

He did not know nor was he advised at that time that a præcipe for a decree *pro confesso* had been filed.

54 This affiant represents to this court that no decree *pro confesso* had been entered; that the answer of the said Thos. E. Wilson and —— —— contains a meritorious defense as is fully and in detail therein set up, and asks that the same may be allowed to remain on the files of this court.

L. I. FLEMING.

Sworn to and subscribed before me this 7 day of April, A. D. 1886.

PHILIP WALTER, *Clerk.*

Endorsement: In the United States circuit court, fifth judicial circuit, northern district of Fla. Executor of Symington *vs.* Thos. E. Wilson *et al.* Affidavit of L. I. Fleming to retain answer on file. Filed April 7, 1886. P. Walter, clerk.

55 In the Circuit Court of the United States for the Fifth Judicial Circuit, Northern District of Florida.

AUGUSTUS W. FABER and JAMES S. WATT, Executors of the Last Will and Testament of James Symington, Dec'd,

vs.

J. C. ANDERSON, Administrator of the Estate of Edward J. Wilson, Dec'd; Thos. Emmet Wilson, George W. Davis, & Sarah J. Davis, His Wife.

The answer of Sarah J. Davies and George W. Davis, her husband, two of the defendants above named, to the bill of complaint exhibited against them by the complainants.

These defendants, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and imperfections in the said complainants' said bill of complaint contained, for answer thereunto or unto so much and such parts thereof as the defendants are advised is or are material or necessary for them to make answer unto, these defendants, answering, say—

That in the winter of 1878 and spring of 1879 these defendants were residing in the city of New York, where they had been residing for some years; that the health of the defendant, Sarah J. Davis, not being good she thought residing in Florida would benefit
56 her, and that in the summer of 1879 she and her husband investigated the subject as well as they could by reading and talking with people from Florida, and from such investigation they concluded that if the climate should prove beneficial to the said Sarah J. Davis they would find it profitable to purchase an orange grove in South Florida, which the said Sarah J. Davis could take care of and manage, except in the summer months, while the said George W. Davis remained at his business in New York, the said Sarah J. Davis spending the summer with him there; that in pursuance of said conclusion the said Sarah J. Davis, in the month of September of said year 1879, came to Florida and began to examine such portions as she had been recommended to with a view of making a purchase; that after spending a short time in Jacksonville she went to Sanford and examined a number or orange groves in the vacinity of that town; that she also examined a number of orange groves at Sylvan Lake, at that time a small hamlet six miles west of Sanford, and among those the orange grove of Thos. E. Wilson, whom she had met in Sanford; that the price and location and appearance of the last-mentioned grove pleased her, and as there was a comfortable cottage on the place, which would save the expense of building for some years, she concluded to purchase said property; that — both Sanford and Sylvan Lake she heard the property spoken of as the property of said Thos. E. Wilson, and found the said Thos. E. Wilson in the full and complete ownership and possession of the said property, cultivating the same and doing as any absolute owner of property would naturally do, and that neither at Sanford nor at

Sylvan Lake did she hear any one speak of the said property as that in which any other person than said Thos. E. Wilson had any in-
57 terest or claimed any interest, although the said Sarah J. Davis met many people at both places and conversed with them about said property; that, having concluded to purchase the said property, said Sarah J. Davis informed said Thos. E. Wilson that she would take the same if her husband approved the sale, and that in said month of Sept., 1879, she started with said Thos. E. Wilson for the city of New York to conclude the bargain; that the purchase met the approval of her husband, and that the matter of title was then for the first time mentioned; that said Thos. E. Wilson produced a deed to the said land, to wit, the southwest quarter of section thirty, township nineteen S., of range thirty E., from Charles E. Emmett & wife to Edward J. Wilson, dated March 15, 1871; consideration, $1,950.00; recorded 28th Nov., 1876, in clerk's office, Orange Co., Fla.; that he then produced a deed from Edward J. Wilson to Thos. E. Wilson to an undivided one-half part of the said tract of land, said deed being dated the 22nd day of May, 1871; consideration, $1,250.00; recorded Sept. 11, 1875; that said Thos. E. Wilson also produced the patent of the United States to Edward J. Wilson, dated April 10, 1875, and not recorded; that said Thos. E. Wilson also produced a tax deed to the other undivided one-half part, being the part formerly owned by Edward J. Wilson, of said S. W. ¼ of sec. 30, T. 19 S., R. 30 E., from James T. Hughey, county clerk of Orange Co., Florida, dated Jan. 16th, 1879, and recorded on the same day in the clerk's office of Orange Co., Fla. The said Thos. E. Wilson thus seemed to have a complete title to the property, and these defendants, being aware, from the personal knowledge of Mrs. Davis of his absolute possession and control of the property,
58 and aware from information gathered from his neighbors of his long-continued, quit, peaceable, and uninterrupted possession of the said property for many years, to wit, since the spring of 1871, and that there had never been a lawsuit against him by any one, determined that they might safely purchase the said property, and accordingly the said Sarah J. Davis did purchase the same, and on the 13th day of October, 1879, took a deed therefor from the said Thos. E. Wilson, dated on that day, for the consideration of ($8,000.00) eight thousand dollars, and at the same time received from the said Thos. E. Wilson all of the deeds and the patents previously set forth herein as the claim and muniments of title to the said land, and to all of which these defendants ask leave to refer as often as may be necessary.

That the defendant, Sarah J. Davis, paid to Thos. E. Wilson in cash on said 13th day of October, 1879, the sum of two thousand dollars, and that she gave on the same day to said Thos. E. Wilson a purchase-money mortgage for six thousand dollars, in which her husband joined.

That the defendant, Sarah J. Davis, her husband approving, thus made a *bona fide* and honest purchase of the entire property from said Thos. E. Wilson.

These defendants, further answering, state, on information and

belief, that the said Thos. E. Wilson had advanced out of his own estate large sums of money in making an orange grove on and cultivating and improving the said property prior to their purchase in Oct., 1879, to wit, the sum of about $6,000.00 or $7,000.00;
59 that on the 28th day of August, 1875, his co-tenant, Edward J. Wilson, without the knowledge or consent of the said Thos. E. Wilson, and therefore fraudulently as to the rights of said Thos. E. Wilson, had executed a mortgage to one James Symington for $13,000.00 upon the entire tract of land, although the said Thos. E. Wilson was in the possession and full control of the land at the time, cultivating and exercising all the common acts of ownership thereof, and that the said James Symington took the said mortgage with notice thereof and with no title of record showing any ownership to the land in said Edward J. Wilson, and that the patent for the land was at the time of the giving of said mortgage and for months afterwards in the possession of the United States, and was delivered into possession of Thos. E. Wilson by the officers of the United States, and never was in the possession or control of said Edward J. Wilson, and that the said Thos. E. Wilson did not know that any mortgage was given until a long time afterwards, and did not know the amount of the mortgage nor the fact that the same purported to cover the entire tract of land until after the record of the said mortgage, in May, 1876, when he discovered it from the records of the clerk's office of Orange Co., Florida.

These defendants, further answering, on information and belief say that on April 15th, 1876, Edward J. Wilson died, and that said mortgage was not recorded until May 3rd, 1876; that on discovering that said mortgage purported to be on the entire property and for an amount so great the said Thos. E. Wilson, mindful of his large advances upon and for the benefit of said property, considered himself to have been so unfairly, unjustly, and fraudulently
60 treated by his co-tenant as to relieve him of any obligation of trust concerning said property, and when made aware, soon afterwards, of the insolvency of the estate of said Edward J. Wilson, and that the heir and devisees of said Edward J. Wilson declined and refused to have anything to do with his property, either in Florida, Vermont, New York, New Jersey, or elsewhere, and no person taking out letters of administration on his estate in Florida, said Thos. E. Wilson felt that he was wholly dropped & cut loose by every person who had or could claim to have any interest in the said property as a co-tenant or otherwise, and was relieved from all obligation of trust to any person concerning the said property, and was a stranger to any other interest than his own; that he accordingly, for the year 1876, returned his own undivided half interest for taxes, and that the assessor of revenue for Orange Co., Florida, assessed separately the other undivided one-half part; that in Oct., 1876, the said Thos. E. Wilson went to New York and went to see said James Symington and frankly stated to him the facts concerning the property, and that he understood, before returning to Florida, that said James Symington had given up all idea of looking to the said property for payment of the indebtedness due him by Edward J.

Wilson, and that said James Symington offered the said mortgage to said Thos. E. Wilson for $2,000.00; that in the winter of 1876 the said Thos. E. Wilson paid the tax upon his part of the said property, and the tax on the other part remained unpaid.

That after seeing said James Symington in New York in 1876 said Thos. E. Wilson never again, directly or indirectly, heard anything from said James Symington or any one representing him until he
61 received a letter from his executor in Nov., 1883; that in the spring of 1877 the said Thos. E. Wilson again returned his own undivided half interest for taxes, and the assessor of revenue for Orange county, Florida, again assessed separately the other undivided half interest; that in the winter of 1877 the said Thos. E. Wilson again paid the taxes upon his undivided half part, and the taxes upon the other half part remained unpaid; that the undivided one-half part of the said property belonging to the estate of the said Edward J. Wilson was duly advertised for sale for taxes by Nat. Poyntz, collector of revenue for said county of Orange, State of Florida, and on the 8th day of January, 1878, was sold for the taxes due for the years 1876 and 1877; that the said Thos. E. Wilson thereupon bought the said undivided half interest of the said property; that no redemption of the said property was made or attempted by any one, although over a year elapsed before the said Thos. E. Wilson took a deed to the same, and that thereupon, on January 16, 1879, the said Thos. E. Wilson took the tax deed previously referred to by these defendants and immediately assumed all the rights incidental to a full and complete and perfect ownership and possession of the entire property, and was in the full enjoyment thereof as absolute owner, holding adversely to any other person, when the defendant, Sarah J. Davis, became acquainted with the said property.

These defendants, further answering, still on information and belief, say that in the spring of the year 1879 the said Thos. E. Wilson returned the whole property for taxes as his own, and that the taxes on the entire tract were paid as his land for that year, and that he also paid the taxes due on the land for the year 1878.

62 These defendants, further answering, say that since the year 1879 the property had been assessed to the defendant, Sarah J. Davis, and she has each and every year paid the taxes on the whole property as her own.

These defendants, further answering, say that after purchasing the said property from the said Thos. E. Wilson on Oct. 13, 1879, the defendant, Sarah J. Davis, remained about a month in New York city, when she returned to Florida and went into the immediate, full, and actual possession of the said tract of land; that she at once had the patent from the United States to Edward J. Wilson and the deed from Thos. E. Wilson to herself put on record in the clerk's office of Orange county, Florida, both being recorded on the 24th day of November, 1879, and that she believed her title perfect to the entire tract.

That defendants ask leave to refer to said patent and deed when necessary; that said Sarah J. Davis rebuilt the fence about the prem-

ises, embracing the entire tract, with a good, substantial fence, and that from the said time of taking actual possession of the said tract of land in November, 1879, she has been in the quiet and peaceable, full and complete, actual possession of the said premises, claiming the same adversely to any other person, and exercising full and complete ownership over the said tract, and doing all acts common thereto without interruption or interference from any source relating to her title until the filing of complainants' bill.

These defendants, further answering, say that the said Sarah J. Davis began also to add improvements of great value to the property, and finding the orange grove and the lake on the north half of the said tract, she continued to improve that half of the prop-
63 erty, and that all of her improvements are on said north half; that she cleared additional land, planted out many more orange trees, greatly added to and beautified the old grove, planted a lemon and olive grove, and now has almost every choice variety of the orange, lemon, and other citrus fruit, and almost every variety of other fruit that care and attention will make grow in the climate and soil of South Florida; that she has now a large area, to wit, about thirty acres, in fruit trees and an additional area of about fifteen acres in improvements and under cultivation; that she has built a new barn and erected one of the finest houses in Orange county on the said tract of land; that said defendant has also, at great expense, made a large and attractive flower garden and made walks and drives on the premises, hauling shell a distance of over three miles to make them firm, and in all respects has greatly beautified and adorned the property, intending it for a permanent home.

These defendants, further answering, say that in making these improvements and in the care and cultivation of the property the said Sarah J. Davis necessarily expended a great deal of money, and that from the time she bought said property to Jan., 1884, she had expended the sum of over twenty thousand dollars on the said property in addition to the said two thousand dollars paid Thos. E. Wilson; that since Jan., 1884, she has been obliged to take care of the property and of the improvements thereon, and in doing so she has expended the sum of over three thousand dollars in excess of all income derived from the said property. These defendants, further answering, say that they are informed and believe that neither James Symington nor his heirs nor his executors or other representatives ever made any demand of any kind upon the said Thos. E. Wilson
64 for anything as due to them upon the mortgage they are now seeking to foreclose, either as principal or interest, nor made any claim upon said land as subject to said mortgage at any time after the interview between said James Symington and said Thos. E. Wilson in the city of New York, above mentioned; and these defendants state positively that no claim to the land or notice of any claim to the land as liable for the said mortgage has ever been given to them or either of them by said James Symington or his heirs or representatives, and that they did not know of the existence of the said Symington mortgage until January, 1884, when one of the heirs of said James Symington visited Sanford and Sylvan Lake,

and these defendants are informed and believe tried to sell the said mortgage to Thos. E. Wilson for the sum of six thousand dollars, although well knowing that said Thos. E. Wilson, notwithstanding his large advances from his own funds for the benefit of the joint property, had sold the entire property to these defendants for the sum of eight thousand dollars; and that the said sale was considered a good sale and for full value at the time it was made.

These defendants, further answering, say that if the said James Symington did not intend to abandon all idea of claiming the said mortgage as a lien on any part of the said property, and if he or his heirs or representatives intended to claim the said mortgage as a lien upon any part of said property, he and they acted in bad faith and fraudulently as to the rights of said Thos. E. Wilson, and if these defendants be sitting quietly by and allowing the said undivided one-half part of the said property that belonged to Edward
65 J. Wilson to go without payment of taxes for the years 1876 and 1877 to be sold for taxes in the year 1878; in not redeeming the same from said tax sale within the time prescribed by law and in never offering to redeem the same; in allowing the said Thos. E. Wilson to take the said tax deed and hold the property under the same as sole owner, to pay all the taxes thereon, and to put large sums of money out on the said property without warning or notice of any kind from them in regard thereto; and in allowing these defendants without any notice of any claim to go into the possession of the said property under the deed from the said Thos. E. Wilson of Oct. 13, 1879, and to remain for years in the absolute possession of said property, paying the taxes thereon and spending vast sums of money in beautifying and improving the same and rendering it of great value; and in making no sign while all the great mutations of said property were taking place, not only as to its appearance and value, but also as to the rights of other persons therein.

These defendants, further answering, say that they claim the benefit of the purchase of the undivided one-half interest in the said land that belonged to Edward J. Wilson at the tax sale on Jan. 8, 1878, as fully as if Sarah J. Davis had purchased at said sale instead of Thos. E. Wilson; that they claim the benefit of the tax deed made to said Thos. E. Wilson on Jan. 16, 1879, and of the adverse possession of said Thos. E. Wilson under said deed as fully as if Sarah J. Davis had been the grantee therein and in the possession of the property; that the long and continuous actual and adverse possession of the said premises by the defendant, Sarah J. Davis, since Oct. 13,
66 1879, founding her title to an undivided half interest therein upon the said tax deed of Jan. 16, 1879, without interruption, suit, or effect made to set aside the said deed by any person or persons whomsoever, and without any suit or proceeding being commenced by any previous owner or claimant, his heirs or assigns, or his or their legal representatives, to set aside the said deed made to Thos. E. Wilson in pursuance of the sale of the said land for taxes or to recover the possession of the said land, has, under the statute of 1874 and the laws of the State of Florida and the decisions thereon, said defendant, Sarah J. Davis, is informed and believes, barred the

right to bring suit to set aside said deed and given her an absolute title thereto, relieved of all encumbrances and liens previously existing against the said property, the State tax constituting a lien prior to all others and a sale under the same conveying a clear title.

These defendants therefore claim absolute title to the said property relieved of and from any lien of the mortgage given by Edward J. Wilson to James Symington.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged; without this, that there is any other matter, cause, or thing in the said complainants' bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable
67 costs and charges in this behalf most wrongfully sustained.

FLEMING & DANIEL,
Def'ts' Sol's.

STATE OF FLORIDA, }
County of Orange, } ss:

Sarah J. Davis, being duly sworn, deposes and says that she has read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge except as to the matters stated on information and belief, and as to those matters she believes it to be true.

SARAH J. DAVIS.

Sworn and subscribed before me this 26th day of April, 1886.

[SEAL.] E. B. VANDEMAN,
Notary Public.

Endorsement: In the circuit court of the United States for the 5th jud. circuit, northern district of Florida. Augustus W. Faber and James S. Watt, as ex'rs of James Symington, dec'd, *vs.* J. C. Anderson, as adm'r of Edward J. Wilson, dec'd; Thos. E. Wilson, Geo. W. Davis, & Sarah J. Davis. Answer of the defendants, Geo. W. Davis & Sarah J. Davis. Filed May 3, 1886. Philip Walter, clerk.

68 In the Circuit Court of the Fifth Circuit of the United States in and for the Northern District of Florida.

GUSTAVUS W. FABER and JAMES S. WATT, Executors of James Symington, Deceased, Complainants,
vs.
J. C. ANDERSON, Administrator of Edward J. Wilson, Deceased; Thomas Emmet Wilson, Sarah J. Davis, and George W. Davis, Defendants.

The Replication of said Complainants to the Answer of Sarah J. Davis and George W. Davis, Defendants.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer of said defendants, Sarah J. Davis and George W. Davis, for replication thereunto say that they do and will aver their said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the said answer of said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

All which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and
69 humbly pray as in and by their said bill they have already prayed.

A. W. COCKRELL & SON,
Sol's for Complainants.

Endorsement: United States court, 5th circuit, northern district Florida. Gustavus W. Faber & James S. Watt, executors, *vs.* J. C. Anderson, adm'r, *et al.* Replication to answer of Sarah J. Davis & George W. Davis. Filed May 10, 1886. Philip Walter, clerk. A. W. Cockrell & Son, solicitors for complainants.

70 In the Circuit Court of the Fifth Circuit of the United States in and for the Northern District of Florida.

GUSTAVUS W. FABER and JAMES S. WATT, Executors of James Symington, Deceased, Complainants,
vs.
J. C. ANDERSON, Administrator of Edward J. Wilson, Deceased; Thomas Emmet Wilson, Sarah J. Wilson, and George W. Davis, Defendants.

The Replication of said Complainants to the Answer of J. C. Anderson, Administrator, and Thomas Emmet Wilson, Defendants.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer of said defendants, J. C. Anderson, administrator,

and Thomas Emmet Wilson, for replication thereunto say that they do and will aver their said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the said answer of said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

71 All which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

A. W. COCKRELL & SON,
Sol's for Complainants.

Endorsement: United States court, 5th circuit, northern district Florida. Gustavus W. Faber & James Symington, executors, *vs.* J. C. Anderson, adm'r, *et al.* Replication to answer of J. C. Anderson, adm'r, & Thomas Emmet Wilson. Filed May 10, 1886. Philip Walter, clerk. A. W. Cockrell & Son, solicitors for complainants.

72 This indenture, made & entered into this the fifteenth day of March, A. D. 1871, between Charles E. Earnest & Sallie L. Earnest, his wife, of the county of Orange & State of Florida, of the first part, and Edward J. Wilson, of the county & State of New York, of the second part, witnesseth:

50-ct. int. rev. stamp. That the said parties of the first part, for and in consideration of the sum of one thousand nine hundred and fifty dollars ($1,950.00), lawful money, to them in hand paid at or before the sealing & delivery

50-cts. int. rev. stamp. hereof (the receipt whereof is hereby acknowledged), have granted, bargained, and sold, aliened, enfeoffed, conveyed, & confirmed, and by these presents do grant, bargain, & sell, alien, enfeoff, convey, & confirm, unto the said party of the second part, his heirs & assigns, all that tract & parcel of land situate, lying, and being in the county of Orange & State of Florida and known & designated in the survey of public lands as the southwest quarter (S. W. ¼) of section thirty (sec. 30), in township nineteen south (T. 19 S.) of range thirty east (R. 30 E.), containing one hundred and sixty acres; to have and to hold all and singular the said tract and parcel of land, with the hereditaments & appurtenances thereunto belonging or in anywise appertaining, with the rents, issues, & profits of the same, together with the remainder or remainders, reversion or reversions, to the proper use, benefit, & behoof *to* him, the said party of the second part, his heirs & assigns forever.

And the said parties of the first part, for themselves, their heirs & assigns, hereby covenant & agree to & with the said party of the second part, his heirs & assigns, against themselves, their

73 heirs and assigns, and every person or persons whomsoever, to warrant and forever defend the aforesaid lands.

In witness whereof the said parties of the first part have hereunto

set their hands and affixed their seals the day and year above written.

CHARLES C. EARNEST. [SEAL.]
SARAH L. EARNEST. [SEAL.]

Signed, sealed, and delivered in presence of—
DANIEL K. HALL.
FELIX W. EARNEST.

STATE OF FLORIDA, }
County of Orange. }

I, Sallie L. Earnest, wife of Charles E. Earnest, do hereby acknowledge, separate and apart from my said husband, that I executed the foregoing deed of conveyance for the purpose of conveying the said lands described therein and as & for my act & deed, and that I executed the said deed freely and voluntarily and without fear or compulsion of or from my said husband.

In witness whereof I have hereunto set my hand and seal this the fifteenth day of March, A. D. 1871.

SARAH L. EARNEST. [SEAL.]

In presence of—
DANIEL K. HALL.
FELIX W. EARNEST.

74 STATE OF FLORIDA, }
County of Orange. }

I, Daniel K. Hall, a justice of the peace in & for the county and State aforesaid, do hereby certify that Sallie L. Earnest, wife of Charles E. Earnest, signed & executed the foregoing acknowledgment before me separately & apart from her said husband, and on a separate and private examination before me separately and apart from her said husband, as aforesaid, she acknowledged that she executed the foregoing deed for the purpose of conveying the lands described therein and as and for her own act & deed, and that she acknowledged that she executed the said deed freely and voluntarily and without any fear or compulsion of or from her said husband.

In witness whereof I do hereunto set my hand and seal this fifteenth day of March, A. D. 1871.

DANIEL K. HALL,
Justice of the Peace.

STATE OF FLORIDA, }
Orange County. }

Be it known that on this 15th day of March, A. D. 1871, personally appeared before me Charles E. Earnest and Sally L. Earnest, his wife, to me known to be the persons described in and who executed the foregoing deed of conveyance, and acknowledged that they executed the foregoing deed of conveyance for the uses and purposes therein expressed; whereupon it is prayed that the
75 same may be recorded.

DANIEL K. HALL,
Justice of the Peace.

Endorsement: Earnest to E. J. Wilson. A. W. Faber *et al. vs.* J. C. Anderson *et al.* Filed in evidence Aug. 5th, 1886. H. H. Buckman, master. Exhibit "A." Filed for record in the office of the clerk of the circuit court for Orange county, Florida, on the 28th day of November, A. D. 1876, and recorded in Book J of Deeds on pages 580, 581, & 582. J. P. Hughey, clerk circuit court for Orange county, Fla., by John Hughey, Jr., deputy clerk.

76 *Warranty Deed.*

This indenture, made the twenty-second day of May, in the year one thousand eight hundred and seventy-one, between Edward J. Wilson, of the city, county, and State of New York, counsellor-at-law, being unmarried, party of the first part, and Thomas Emmet Wilson, of Mellenville, in the county of Orange & State of Florida, party of the second part, witnesseth:

That the said party of the first part, in consideration of the sum of one thousand two hundred and fifty dollars to him duly paid before the delivery hereof, has bargained and sold, and by these presents does grant and convey, to the said party of the second part, his heirs and assigns forever, all the undivided moiety or one-half part of all that tract and parcel of land situate, lying, and being in the county of Orange and State of Florida and known and designated in the survey of public lands as the southwest quarter of section (30) thirty, in township nineteen south of range 30 (thirty) east, containing one hundred and sixty (160) acres, with the appurtenances and all the estate, right, title, and interest of the said party of the first part therein.

And the said party of the first part doth hereby covenant and agree to and with the said party of the second part that at the time of the delivery hereof the said party of the first part is the lawful owner of the premises above granted and seized thereof in fee simple absolute, and that he will warrant and defend the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever.

77 In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

EDW. J. WILSON. [SEAL.]

Sealed and delivered in the presence of—
EDWIN F. COREY, JR.
WM. H. BOWERS.

[$1. Int. rev. stamp. $1.00.]
[50 cents. Int. rev. stamp. 50.]

Corey & Son, notaries public & commissioners for Maine, New Hampshire, &c.; office, 54 Wall street, N. Y. city.

UNITED STATES OF AMERICA,
State of New York, City & County of New York, } *ss:*

Be it remembered that on this twenty-second day of May, in the

year one thousand eight hundred and seventy-one, before me, the undersigned, Edwin F. Corey, Jr., a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Florida to take the acknowledgment of deeds, &c., to be used or recorded therein, personally appeared Edward J. Wilson, to me known to be the person who executed the foregoing and by him sealed and subscribed, and acknowledged the execution thereof to be his free act and — and for the uses and purposes therein mentioned.

78

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[SEAL.] EDWIN F. COREY, JR.,
Commissioner for the State of Florida,
Office, 54 Wall St., New York.

Endorsement: Edward J. Wilson to Thomas Emmet Wilson. Undivided half S. W. ¼ S. 30, T. 19, R. 30. Deed. Dated May 22nd, 1871. Filed for record in the office of the clerk of the circuit court for Orange county, Florida, on the 11th day of September 1875, and recorded in Book J of Deeds, on pages 20 & 21. J. P. Hughey, clerk of circuit court for Orange county, Florida, by C. A. Boone, deputy clerk. A. W. Faber *et al. vs.* J. C. Anderson *et al.* Filed in evidence Aug. 5th, 1886. H. H. Buckman, master. Exhibit "B."

79 THE UNITED STATES OF AMERICA:

Certificate No. 33.

To all to whom these presents shall come, Greeting:

Whereas Edward J. Wilson, of Orange county, Florida, has deposited in the General Land Office of the United States a certificate of the register of the land office at Gainesville, Florida, whereby it appears that full payment has been made by the said Edward J. Wilson, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the southwest quarter of section thirty, in township nineteen south, of range thirty east, in the district of lands subject to sale at Gainesville, Florida, containing one hundred and forty-two acres and forty-hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Edward J. Wilson:

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant unto the said Edward J. Wilson and to his heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Edward J. Wilson and to his heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the
80 United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereto affixed.

Given under my hand, at the city of Washington, the
[SEAL.] tenth day of April, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

By the President: U. S. GRANT,
By S. D. WILLIAMSON, *Secretary.*

L. K. LIPPINCOTT,
Recorder of the General Land Office.

Recorded vol. I, page 10.

Endorsement: 33. Edward J. Wilson. Filed for record in the office of the clerk of the circuit court for Orange county, Florida, on the 24th day of November, A. D. 1879, and recorded in Deed Book "P" on page 315. J. P. Hughey, clerk, by John Hughey, Jr., deputy clerk. A. W. Faber *et al. vs.* J. C. Anderson *et al.* Filed in evidence Aug. 5th, A. D. 1886. H. H. Buckman, master. Exhibit "C."

81 *Tax-Sale Deed.*

To all whom these presents shall come, Greeting:

Whereas, at a sale of lands by Nat. Poyntz, collector of revenue of the county of Orange, at public auction, at Orlando, in the said county of Orange, on the eighth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, for the non-payment of the taxes levied and assessed thereon for the year one thousand eight hundred and seventy-six & seven, and which remained unpaid on the day of such sale, together with the costs and charges due therewith, the following-described land, lying and being in the said county of Orange and State of Florida, to wit, one-half interest in the southwest quarter of section thirty, in township nineteen south, of range thirty east, containing one hundred and forty-two acres, assessed for taxes as the property of the estate of E. J. Wilson, was sold to Thomas E. Wilson, of Orange county, Florida, who was the best bidder therefor, for the sum of forty-one dollars and thirteen cents, which said sum was the whole amount of taxes due and unpaid on said tract or parcel of land for the years aforesaid, together with the interest and costs due thereon and the charges of such sale, and has been paid by the said Thomas E. Wilson to the said Nat. Poyntz, collector of revenue aforesaid:

Now, therefore, know all men by these presents that the State of Florida, in consideration of the sum of money aforesaid and the premises and in conformity with law, hath and doth hereby give, grant, and convey the said tract or parcel of land above described, together with the hereditaments and appurtenances, to the said Thomas E. Wilson and to his heirs and assigns to their sole use and benefit forever.

82 In testimony whereof I, James P. Hughey, county clerk of Orange county, have executed this deed pursuant to and in virtue of the authority invested by law and for and on behalf of said State, and have hereunto subscribed my name officially and affixed the seal of the county court of the said county of Orange, at Orlando, in the said county of Orange, this the sixteenth day of January, in the year of our Lord one thousand eight hundred and seventy-nine.

J. P. HUGHEY, [SEAL.]
County Clerk, Orange County, Florida.

Done in presence of—
JAMES P. DAVIS.
A. J. BARKER.

STATE OF FLORIDA, }
County of Orange. }

Be it remembered that on this the sixteenth day of January, A. D. 1879, — C. A. Boone, a justice of the peace in and for the State and county aforesaid, personally appeared J. P. Hughey, county clerk in and for said county, and acknowledged that he executed the within and foregoing deed at the time and for the uses and purposes therein expressed; whereupon it is prayed that the same may be recorded.

In witness whereof I have hereunto affixed my hand and seal, at Orlando, on this the 16th day of January, A. D. 1879.

83 C. A. BOONE, [SEAL.]
Justice of the Peace.

Endorsement: A. W. Faber *et al. vs.* J. C. Anderson *et al.* Filed in evidence Aug. 5th, 1886. H. H. Buckman, master. Exhibit "D." Filed for record in the office of the clerk of the circuit court for Orange county, Florida, on the sixteenth day of January, 1879, and recorded in Record of Tax Sale Deeds, on pages 35 & 36. J. P. Hughey, clerk circuit court of Orange, Florida.

84 This indenture, made the thirteenth day of October, in the year one thousand eight hundred and seventy-nine, between Thos. Emmet Wilson, of Sylvan Lake, Orange county, Florida, party of the first part, and Sarah J. Davis, wife of G. W. Davis, of the city of New York, party of the second part, witnesseth: That the said party of the first part, in consideration of the sum of eight thousand dollars, has bargained and sold and by these presents does grant and convey to the said party of the second part, her heirs and assigns forever, all that tract and parcel of land situate, lying, and being in the county of Orange and State of Florida and known and designated in the survey of public lands as the southwest quarter of section (30) thirty, in township (19) nineteen south of range (30) thirty east, containing one hundred and forty-three acres, be the same more or less, with the appurtenances and all the estate, right, title, and interest of the said party of the first part therein; and the said party of the first part doth hereby covenant and agree to and with the said party of the second part that at the time of the delivery hereof the said party of the first part is the lawful owner

of the premises above granted and seized thereof in fee simple absolute, and that he will warrant and defend the said premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

THOS. EMMET WILSON. [SEAL.]

Sealed and delivered in the presence of—
JOHN A. MACDONALD.
EDWIN S. STUDWELL.

85 CITY AND COUNTY OF NEW YORK, *ss:*

On the thirteenth day of October, in the year *of* one thousand eight hundred and seventy-nine, before me personally came Thos. Emmet Wilson, known by me to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he executed the same for the purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year above written.

EDWIN S. STUDWELL,
[SEAL.] *Commissioner* for *Deeds for Florida in and for New York.*

Endorsement: Thos. Emmet Wilson to Sarah J. Davis. Deed of conveyance. Filed for record in the office of the clerk of the circuit court for Orange county, Florida, on the 24th day of November, A. D. 1879, and recorded in Deed Book "P," on pages 316 & 317. James P. Hughey, clerk, by Jno. Hughey, Jr., deputy clerk. A. W. Faber *et al. vs.* J. C. Anderson *et al.* Filed in evidence Aug. 5th, A. D. 1886. H. H. Buckman, master. Exhibit "E."

86 *Mortgage, with Power of Sale.*

This indenture, made the thirteenth day of October, in the year one thousand eight — and seventy-nine, between Sarah J. Davis & G. W. Davis, her husband, of the city of New York, parties of the first part, and Thos. Emmet Wilson, of Sylvan Lake, Orange county, Florida, party of the second part, witnesseth: That the said parties of the first part, in consideration of the sum of six thousand dollars to them duly paid, have sold and by these presents do grant and convey to the said party of the second part all that tract of land situate, lying, and being in the county of Orange and State of Florida and known and designated in the survey of public lands as the southwest quarter of section (30) thirty, in township (19) nineteen south of range (30) thirty east, containing one hundred and forty-three acres, be the same more or less, with the appurtenances, and all the estate, title, and interest of the said parties of the first part therein. This grant is intended as a security for the payment of six thousand dollars, with interest at six per cent. per annum, payable semi-annually, the said six thousand dollars being a part of

the consideration money for the premises above described and this day conveyed by deed to the party of the first part herein by the party of the second part; all of said six thousand dollars and interest to be paid in full within five years from this date, which payments, if duly made, will render this conveyance void.

And if default shall be made in the payment of the principal or interest above mentioned, then the said party of the second part and his heirs or assigns are hereby authorized, pursuant to statute, to sell the premises above granted or so much thereof as will
87 be necessary to satisfy the amount then due, with the costs and expenses allowed by law.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

SARAH J. DAVIS. [SEAL.]
GEO. W. DAVIS. [SEAL.]

Sealed and delivered in the presence of—
JOHN A. MACDONALD.
EDWIN S. STUDWELL.

STATE OF NEW YORK, }
City of New York, County of New York, } *ss.:*

On the thirteenth day of October, in the year one thousand eight hundred and seventy-nine, before me personally came Sarah J. Davis and G. W. Davis, her husband, both known by me to be the individuals described in and who executed the foregoing instrument, and then and there acknowledged that they executed the same for the purposes therein expressed; and the said Sarah J. Davis, on a private examination by me made separate and apart from her husband, did acknowledge and declare that she executed the same freely and voluntarily and without any constraint, compulsion, apprehension, or fear of or from her said husband.

88 In witness whereof I have hereunto set my hand and affixed my official seal the day and year above written.

[SEAL.] EDWIN A. STUDWELL,
Commissioner of Deeds for Florida in & for New York.

Endorsement: Sarah J. Davis & Geo. W. Davis to Thos. Emmet Wilson. Mortgage. Filed for record in the office of the clerk of the circuit court for Orange county, Florida, on the 24th day of October, A. D. 1879, and recorded in Book "A" of Mortgages, on pages 509, 510, & 511. James P. Hughey, clerk, by Jno. A. Hughey, Jr., D. C. Exhibit "F." Filed in evidence Aug. 5th, A. D. 1886. H. H. Buckman, master. A. W. Faber *et al. vs.* J. C. Anderson *et al.*

89 This indenture, made this first day of June, A. D. 1884, by and between Thos. E. Wilson, of Sylvan Lake, Orange county, Florida, party of the first part, and Mary F. Wilson, of Peekskill, Westchester Co., N. Y., party of the second part, witnesseth: That said party of the first part, for and in consideration of the sum of one thousand dollars to him in hand paid by said party of the sec-

ond part and receipt of which is hereby acknowledged, does hereby assign and set over to said party of the second part, for the purpose of securing the repayment of the said sum of one thousand dollars, with interest thereon at the rate of seven per cent. per annum, payable semi-annually, at or before the expiration of five years from the date hereof, as the party of the first part shall elect, a certain purchase-money mortgage on the property of Sarah J. Davis, situate at Sylvan Lake aforesaid and described as the southwest quarter of section thirty (30), in township nineteen south of range thirty (30) east, containing one hundred and forty-three acres of land, being the same property on which said party of the second part is secured for a previous loan of three thousand dollars to the said party of the first part by assignment of the same mortgage as security for said amount that is hereby assigned for the said additional sum of one thousand dollars, said purchase-money mortgage being executed to the party of the first part by said Sarah J. Davis and Geo. W. Davis, her husband, on the 13th day of October, A. D. 1879, and recorded in Book A of Mortgages, in the clerk's office of Orange county, Florida, on the 24th day of October, 1879, it being the purpose and intention of the party of the first part to assign said mortgage as security for the said sums advanced by the party of the second part to the party of the first part to the full amount of said sums and
90 all interests to become due thereon and costs of collecting the same, should any accrue, the balance due on said mortgage after the party of the second part is fully *ratified* remaining the property of the party of the first part; and the party of the first part does hereby make, constitute, and appoint the said party of the second part his true and lawful attorney irrevocable, in the name of the party of the first part or otherwise, to have, use, and take all lawful ways and means for the recovery of the said money and interest, and in case of payment to discharge the same to the amount due said party of the second part as fully as I might do if these presents were not made.

In witness whereof I have hereunto set my hand and seal this first day of June, A. D. 1884.

THOS. EMMETT WILSON. [SEAL.]

Witnesses:
A. M. THRASHER.
WM. SCOTT.

STATE OF FLORIDA, }
County of Orange. }

On this 14th day of June, A. D. 1884, personally came before me Thos. Emmett Wilson, to me known to be the person described in and who executed the above and foregoing assignment of mortgage, and acknowledged to me the execution thereof as and for his free act and deed.

In witness whereof I have hereunto set my hand and affixed seal this day and year just above written.

A. M. THRASHER,
Notary Public. [SEAL.]

91 Filed in the office of the clerk of circuit court of Orange county, Florida, this Jun- 18, 1884; recorded in Book G, page 541.

T. J. SHINE,
Clerk Circuit C't,
By D. S. SHINE,
Deputy Clerk.

STATE OF FLORIDA, }
County of Orange, } *ss:*

I, T. J. Shine, clerk of the circuit court in and for the State and county aforesaid, hereby certify that the above and foregoing is a true and correct transcript of the records of the office, as shown on pages 541 & 542, Book G of Mortgages.

Witness my hand and seal of said court this 3rd day of August, A. D. 1886.

T. J. SHINE, *Clerk,*
By J. M. BRADSHAW, *D. C.*

Endorsement: Thos. E. Wilson to Mary F. Wilson. Copy assignment of mortgage. Filed in the office of the clerk of circuit c't of Orange Co., Florida, this June 18, 1884. Recorded in Book G, pages 541, &c. T. J. Shine, clerk c't c't, by D. S. Shine, dept. cl'k. A. W. Faber *et al. vs.* J. C. Anderson *et al.* Filed in evidence Aug. 5th, A. D. 1886. H. H. Buckman, master. Exhibit G.

92 Know all men by these presents that I, Thos. Emmet Wilson, of Sylvan Lake, Orange county, Florida, for and in consideration of the sum of three thousand dollars to me in hand paid by Mary F. Wilson, of Peekskill, Westchester Co., N. Y., the receipt of which is hereby acknowledged, do sell, assign, transfer, and set over to said Mary F. Wilson a certain purchase-money mortgage given me by Sarah J. Davis and George W. Davis, of the city of New York, upon the southwest quarter of section thirty, in township nineteen south, of range (30) thirty east, dated Oct. 13th, A. D. 1879, for the sum of six thousand dollars, and filed for record in the clerk's office of Orange Co., Florida, on the 24th day of Oct., A. D. 1879, to the extent and for the purpose of securing the said sum of three thousand dollars, with interest thereon at the rate of seven per cent., to the said Mary F. Wilson; and I do hereby make, constitute, and appoint the said Mary F. Wilson my true and lawful attorney, in my name or otherwise to have, use, and take all lawful ways and means for the securing of the said money and interest, and in case of payment to discharge the same.

Dated Dec. 31st, 1883.

THOS. E. WILSON. [SEAL.]

In the presence of—
S. GUMPERT.
A. M. THRASHER.

STATE OF FLORIDA, } ss:
County of Orange, }

On this day personally came before me Thos. Emmet Wilson, to me well known as the person described in and who executed
93 the foregoing assignment of mortgage, and acknowledged to me the execution thereof as and for his act and deed.

In witness whereof I hereunto set my hand and seal this 31st day of Dec'r, 1883.

[L. S.] A. M. THRASHER,
Notary Public.

Filed in the office of the clerk of circuit court of Orange county, Florida, this Jan. 3rd, 1884. Recorded in Book G, page 256.

T. J. SHINE,
Clerk Circuit C't,
By D. S. SHINE,
Deputy Clerk.

STATE OF FLORIDA, } ss:
County of Orange, }

I, T. J. Shine, clerk of the circuit court in and for the State & county aforesaid, hereby certify that the above and foregoing is a true and correct transcript of the records of this office as shown on page 256, Book G of Mortgages.

Witness my hand and the seal of said court this 3rd day of August.

T. J. SHINE, *Clerk,*
By J. W. BRADSHAW, *Dep.*

Endorsement: A. W. Faber *et al. vs.* J. C. Anderson *et al.* Filed in evidence Aug. 5th, 1886. H. H. Buckman, master. Exhibit "H."

94 This indenture, between George W. Davis, of the city of New York, and Sarah J. Davis, his wife, of the first part, and William H. Appleton, Daniel S. Appleton, William M. Appleton, and Daniel Appleton, partners under the firm name of D. Appleton & Co., of the city of New York, of the second part, witnesses:

That whereas the said George W. Davis is justly indebted to said parties of the second part in the sum of about seventeen thousand dollars, and the said parties of the second part have instituted their suit in equity in the circuit court of the United States for the northern district of Florida to subject the lands hereinafter described to the payment of said indebtedness, and have agreed on their part to discontinue and dismiss said suit, and to release and discharge the said George W. Davis from said indebtedness if he will secure to them the payment of fifteen thousand dollars, payable in five years, without interest:

Now, therefore, we, the said parties of the first part, do hereby give and grant unto the said parties of the second part in fee simple the following real estate situate in Orange county, Florida:

The southwest quarter of section thirty (30), township (19) nine-

teen, range thirty (30) east, containing about one hundred and forty-three acres—

The tract first above described being subject, however, to a mortgage executed by us to Thomas E. Wilson, dated the thirteenth of October, 1879, recorded in the records of deeds for said county; and we, the said parties of the first part, do hereby jointly and severally covenant with the said parties of the second part to pay the
95 said sum of fifteen thousand dollars in five years, without interest; to pay all lawful taxes and assessments that may be imposed upon said real estate; to suffer no waste to be committed thereon which would depreciate the value of said property; to keep the building insured, in a sum not less than five thousand dollars, for the benefit of the mortgages, in the order of their priority as their interest may appear, in case of loss by fire: Provided, however, that upon the full performance of all and singular the foregoing covenants this instrument is to cease and become of no effect; but in the event of default in the performance of any of the said covenants or of the seizure of said property under legal process, then the said parties of the second part may enter upon and take possession of said property and sell the same at public outcry, at the time and place and on the like notice that sales of land are had in said county under execution, and apply the proceeds, after defraying all reasonable cost and expenses of effecting such sale, to include reasonable lawyer's fees, to the discharge of any and all liens or incumbrances paramount to that of this mortgage on said lands; next, to the reimbursement of the said parties of the second part for any taxes or insurance premiums they may have paid out on account of said property and any other sums necessar-y expended by them towards the preservation of this security; and, lastly, to the payment of the said sum of fifteen thousand dollars, whether due or not, and interest, if such default happen after five years; and it is further understood that if by reason of default in the performance of any of the foregoing covenants to be kept on the part of the parties of the first part the said parties of the second part shall incur any lawyer's fees, the reasonable amount thereof shall be a charge on the said
96 property, whether or not this mortgage be executed under the power of sale herein or by judicial decree.

In witness whereof we have hereunto set our hands and seals this 30th of January, 1884.

SARAH J. DAVIS. [SEAL.]
GEO. W. DAVIS. [SEAL.]

Witnesses as to Sarah J. Davis:

H. STEINAYAL.
A. M. THRASHER.

Witnesses as — Geo. W. Davis:

WM. G. CHITLECK, JR.
CHAS. LAX BROOKE.

STATE OF FLORIDA, }
Orange County. }

I hereby certify that Sarah J. Davis, the wife of George W. Davis, is personally known to me; that she came before me this day. On a private examination, had separate and apart from her husband, she acknowledged before me that, being fully informed of the contents of the foregoing conveyance and mortgage, she executed the same of her own free will and accord and without any fear, constraint, or compulsion of her husband.

Given under my hand and seal this 30th day of January, 1884.

A. M. THRASHER,
Notary Public. [L. S.]

97 STATE OF NEW YORK, }
City and County of New York. }

I hereby certify that George W. Davis is personally known to me, and that he acknowledged before me this day that he executed the foregoing instrument.

Given under my hand and seal this 4th day of February, 1884.

[L. S.] WILLIAM J. FINEGAN,
Notary Public, N. Y. Co.

This mortgage is executed with the understanding that no personal liability shall attach to me for any part of the sum for which this mortgage is given, should the property therein described prove insufficient to pay said sum in full.

SARAH J. DAVIS.

Witness my hand this Jan'y 30th, 1884.

A. M. THRASHER,
Notary Public.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

I, Patrick Keenan, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that William J. Fenegan, whose name is subscribed to the certificate of the proof or
98 acknowledgment of the annexed instrument and the evidence written in, is at time of taking such proof and acknowledgment a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged accordiag to the laws of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 4th day of Feb., 1884.

[L. S.] PATRICK KEENAN, *Clerk.*

Filed in the office of the clerk of circuit court of Orange county, Florida, Feb. 12, 1884. Recorded in Book G of Mtg., pages 323, 324, to '26.

T. J. SHINE,
Clerk Circuit C't.
D. S. SHINE,
Deputy Clerk.

STATE OF FLORIDA, } ss:
County of Orange, }

I, T. J. Shine, clerk of the circuit court in and for the State and county aforesaid, hereby certify that the above and foregoing is a true and correct copy of the records in this office as shown on
99 pages 323, 324, 325, & 326, Book G of Mortgages.

Witness my hand and the seal of said court this 2nd day of August, A. D. 1886.

T. J. SHINE, *Clerk,*
By J. N. BRADSHAW, *D. C.*

Endorsement: Davis to Appleton. Certified copy. A. W. Faber *et al. vs.* J. C. Anderson *et al.* Filed in evidence Aug. 5th, 1886. H. H. Buckman, master. Exhibit "I."

100 NEW YORK, *March* 17, '79.

MY DEAR EMMET: I forgot to say to you on parting that I think the title to the farm should be taken in your name.

Also to enquire whether there are other localities where it may be more advantageous to locate, and to visit and examine them, remaining in any place long enough, in your judgment, to be able to form a correct opinion.

Hoping to hear from you on your arrival in Jacksonville,

Y'r affectionate EDW.

Endorsement: Exhibit "K." G. W. Faber *et al. vs.* J. C. Anderson *et al.* Filed in evidence with envelope attached. H. H. Buckman, master. Thos. Emmet Wilson, Esq., care of St. James Hotel, Jacksonville, Florida. J. C. Anderson. Filed in evidence Aug. 6th, 1886. H. H. Buckman, master.

101 In the Circuit Court of the United States, 5th Judicial Circuit, for the Northern District of Florida. In Chancery.

G. W. FABER *et al.* } Foreclosure.
vs.
J. C. ANDERSON *et al.* }

To the honorable the judges of said court, in chancery sitting:

Pursuant to the consent agreement of the respective counsel for complainants and defendants in the above-entitled cause, in writing, which bears date August 4th, A. D. 1886, and is hereto attached, marked "A," I did, on the 5th day of August, A. D. 1886, proceed to take testimony in said cause produced before me, the

same being reduced to writing in my presence and the presence of the respective witnesses and Fleming & Daniel, Esqrs., solicitors for the defendants, and A. W. Cockrell, Esqr., solicitor for the complainants, which taking of testimony was continued from day — until closed, and which testimony, together with the objections of counsel, is hereto attached, marked "B."

Master's fees:

80 fols.	$20 00
3 wits.	30
11 exhibits	1 10
Attendance	8 00
Report	2 00
Total	$31 40

All of which is respectfully submitted.

H. H. BUCKMAN, *Master.*

102 EXHIBIT "A."

In Circuit Court of the United States, 5th Judicial Circuit, in and for the Northern Dist. of Fla. In Chancery.

G. W. FABER *et al.*
vs.
J. C. ANDERSON *et al.* } Foreclosure.

It is hereby consented and agreed by and between the undersigned that H. H. Buckman, Esq., an attorney and solicitor of this court, take the testimony in this cause as master.

A. W. COCKRELL & SON,
Solicitors for Complainants.
FLEMING & DANIEL,
Solicitors for Defendants.

August 4th, 1886.

103 EXHIBIT "B."

Witness, THOMAS E. WILSON, being introduced on behalf of the defendants, being duly sworn, testifies as follows:

(Testimony taken by consent of parties.)

Q. What is your name, where do you reside, and what is your profession?

A. Thomas E. Wilson; I reside at Sylvan Lake, near Sanford, Orange county, Florida; I am an attorney-at-law.

Q. How long have you resided in Orange county, Florida?

A. Between 15 and 16 years.

Q. Have you any knowledge as to a tract of land known as the southwest quarter of section 30, in T. 19 S., R. 30 E.? If so, state where this land is particularly and when you first knew the property and if you know who was in possession of it at that time.

A. I know the land. It is situate about six miles west of Sanford, in Orange county, Florida, at Sylvan Lake. I first knew the land in March of 1871. It was then turned over to me by Mr. C. E. Earnest and by his agents.

Q. What was the condition of the property at the time it was turned over to you—what improvements, if any, were upon it?

A. There were about 5 acres cleared and 5 acres partly cleared, what is called deadened. The 10 acres were surrounded with a good substantial rail fence. There was a house on the property and several outbuildings. There was sugar cane growing on a part of the land, and a corn crop was growing on it. I saw that it had been cultivated the previous year in corn from the stalks. There were about 250 or 300 small orange trees planted on it and quite a good many nursery trees.

104 Q. Did you know Edward J. Wilson in his lifetime? If so, state what, if any, relation existed between you as to blood.

A. I knew him. He was my uncle.

Q. How was it that you went upon this property in 1871?

A. My uncle, Edward J. Wilson, and myself made an agreement by which I was to come to Florida and take charge of such property as should be purchased here and have the management of it and make an orange grove. I had been living at New York city and at Peekskill, a village on the Hudson 40 miles from New York city. My uncle was living in New York city. My uncle was to send all the money necessary to run the place. I turned over to him my interest in property in Peekskill, amounting, as near as I recollect, to some $1,500, consisting of an interest in an iron foundry. My uncle came to Florida, in pursuance of our agreement, and selected this property of Mr. Earnest's and agreed to buy it from him. He then returned to New York. I afterwards came down to look at the property, and I liked it and concluded the trade with Mr. Earnest, paid him the balance of the purchase-money, and got the deed to the property, which is here offered in evidence.

(A paper, purporting to be a deed from Charles E. Earnest & wife to Edward J. Wilson, offered in evidence, the formal execution of which is admitted *and* complainants' counsel. Defendants here also agree, by counsel, that any matters of objections as to competency of witnesses and legality, relevancy of evidence, or introduction of papers may be made at the end hereof by counsel so objecting. The deed so offered in evidence is herewith filed, marked Exhibit "A.")

105 I went upon the property and examined it and liked it and took actual possession of it in March, 1871. The deed from Earnest & wife was to have been executed to me, but was executed before my arrival, and as I found it had been made to Edward J. Wilson I took it and he executed a deed to me of an undivided one-half interest in the property, this deed being dated 22nd of May, 1871, and I being in actual possession of the property from March, 1871.

(The deed of Edward J. Wilson to Thomas E. Wilson offered in evidence and filed, marked Exhibit "B," the formality of the execution of which is admitted by complainants' solicitors.)

I received that deed while in possession of the property and continued in the actual possession of the property until I sold it, in October, 1879, holding it and claiming it as my own exclusively and absolutely—that is, my interest in it. I immediately began to improve the property and set out more trees, built new buildings, cleared more land, and made general improvements upon the property—cultivated it, took care of it and fertilized the trees, and did all the usual acts of ownership in taking care of it. I lived upon the property personally. I had a tract of land adjoining it on which I lived some of the time, but the tract of which I was put in possession under that deed was at all times under my supervision and control, and for a great part of the time was actually my home.

Q. State, if you please, when and to whom patent issued for these lands from the United States Government, and if you have the original patent produce it.

A. I have the patent. It is dated April 10th, 1875, and was delivered to me from the Gainesville land office in the month of November, 1875. It was made to Edward J. Wilson.

106 (Patent from the United States to Edward J. Wilson offered and admitted in evidence without objection and filed and marked Exhibit "C.")

Q. State more particularly, if you please, as to the character of the improvements made by you on this land from the time you went into possession of it under your agreement with Edward J. Wilson, the cost of such improvements, and the source from which you derived the means to make them.

A. I first built a stable on it; then I built a small barn. I had additional land cleared and fenced, fencing in about 10 acres additional. I kept the land cultivated and trees worked and fertilized. I set out about as many more trees as I found there; some 300. I made nurseries on the property; bought horses to take care of it, farming utensils, and hired men to work on it, and from the time that I went there and took possession of it until the early part of 1876 I had expended, as well as I can get at the figures, about $5,000 upon the property, of which I had received about $2,000 from Edward J. Wilson; the balance I had earned from my salary as State's attorney for the 7th judicial circuit and from my law practice. To October, 1879, I had spent in addition about $3,000 in taking care of the place and the buildings, all of which came from my own earnings. During that time I was compelled to rebuild the house, the foundation of which had completely rotted out, and I had it plastered and made a small neat cottage.

Q. During the period of the time to which you have testified was the property yielding or did it yield any revenue to you; if so, what, and to what condition had you brought the grove when you sold it?

107 A. I had brought the grove forward from very small trees—most of them not more than two feet high when it was bought and the balance nursery trees that I had set out myself, grown on the place—to a grove beginning to bear when I sold it. I think $50 would cover all the income from the grove in the year 1878, which was the first that I remember any income being derived from it, and I do not remember ever receiving any other income from it in any shape.

Q. When did Edward J. Wilson die, and where?

A. He died April 15th, 1876, in the city of New York.

Q. I notice, Mr. Wilson, that the deed from Edward J. Wilson to you, which has been offered in evidence, is marked "Filed in the office of the clerk of the circuit court for Orange county, Florida, on the 11th day of September, 1875, and recorded in Book 1 of Deeds, on pages 20 and 21." Explain, if you please, why this deed, though made in May of 1871, was not recorded by you until the 11th of September, 1875.

A. When I went to Orange county affairs were in a very unsettled condition, and there was a miserable old court-house and no security for papers, and I was informed of the burning of the court-house, and in consequence of this unsettled condition of matters I did not like to trust papers there for some time after I went there. The deed was then laid aside, and I did not think anything further about it for some time afterwards. I was informed of the defalcation of the land officer and that there was some trouble, and I neglected, under these circumstances, to have the deed recorded, but it was recorded before I had any knowledge of the giving of the mortgage by Edward J. Wilson.

108 Q. State, in this connection, if you please, when you first had any information with regard to the mortgage having been given by Edward J. Wilson *in* this property.

A. I think it was in October, 1875. It may have been in November. It was, to the best of my recollection, in one of those two months. I never knew the amount of the mortgage nor the fact that it purported to cover the whole property until I learned it in the clerk's office in Orange county, Florida, in May, I think, of 1876, after the death of Edward J. Wilson.

Q. Do you or not state, then, that the mortgage set up in complainants' bill was given without your knowledge or consent in any way?

A. Yes, sir; it was made without my knowledge or consent. I knew nothing whatever about it at the time it was given nor until some time afterwards.

Q. State, if you please, whether or not any communication reached you in regard to this mortgage after the death of Edward J. Wilson from the representatives of his estate. If so, when and to what effect and what transpired in this connection?

A. I was informed by the representatives that the estate was insolvent, and that the heir and the devisees declined to take anything or have anything to do with the property of the estate.

Q. You have stated that you remained in possession of this prop-

erty to some time in 1879. Please state whether or not the taxes on the property were paid, and, if so, by whom, for the years antecedent to 1879.

109 A. Upon learning the condition of the estate of Edward J. Wilson and that the heirs and devisees would have nothing to do with it I returned the taxes upon my undivided interest in the property in my name for the year 1876 and paid them, and the other half interest was separately assessed. In the year 1877 I also returned my undivided one-half interest for taxes and paid the taxes upon it and did not pay upon the other part, and the other one-half interest was assessed separately. The undivided one-half interest of Edward J. Wilson was advertised for taxes in the year 1877 for the years 1876 and 1877, and on the 8th day of January, 1878, was sold for taxes by Nat. Pointz, the collector of revenue for Orange county, Florida. I was present at the sale and bid in the property. I received a certificate of the sale from the collector of revenue, and in January, 1879, I received a deed, executed January 16th, 1879, to that undivided one-half interest. I paid the taxes on the whole property myself for the years 1878 and '9 as my property.

(What purports to be a tax deed from the State of Florida, bearing date the 16th day of January, 1879, offered in evidence, the formal execution of which is admitted by complainants' counsel, is filed and marked Exhibit "D.")

Q. State what demonstration and claim and assertion of title you made to this property from the date of this tax purchase and deed up to the time when you sold the property, in 1879.

A. I claimed it as my own individual property. The entire interest in the estate I claimed absolutely from that time until I sold it, and I was in actual and continuous possession of it from that time until I sold it, doing with it just as I saw fit in

110 every respect. I saw Mr. Symington in October, 1876, in New York in regard to the property (Mr. Symington was the holder of the mortgage which had been made by Edward J. Wilson) and informed him in regard to the property, and we came to an understanding about it, and the papers were drawn up. I appeared on the day appointed to sign, but Mr. Symington did not appear, and I understood from his attorney that something had been received from the property which was prior security to this mortgage, and that Mr. Symington did not intend to look to the Florida property. I then returned to Florida, and from that time until November, 1883, I never heard a word either from Mr. Symington or his representatives in regard to any claim upon the property by him or them.

Q. To whom and when did you sell this property, and what estate did you convey?

A. I sold the property on October 13th, 1879, to Mrs. Sarah J. Davis, who is one of the defendants to this suit, and conveyed to her the entire property by warranty deed.

(Deeds of Thomas E. Wilson to Mrs. Sarah J. Davis offered in

evidence, the formal execution of which is admitted by complainants' counsel, the same being filed and marked "Exhibit E.")

Q. What was the consideration paid you for the conveyance of this property, and how was it paid or secured?

A. The consideration was $8,000. Of this Mrs. Davis paid $2,000 in cash on the day it was delivered and gave me a purchase-money mortgage for $6,000.

(Mortgage of Sarah J. Davis and husband to Thomas E. Wilson offered in evidence, the formal execution of which is admitted by the solicitors for the complainants, the same being filed and
111 marked "Exhibit F.")

Q. Has that mortgage been paid or any part of it?

A. No, sir.

Q. Do you own the entire mortgage now, or have you or not made any assignments, and what were the assignments made to secure?

A. I assigned the mortgage as security for 3,000 borrowed from my mother and as security for an additional $1,000 borrowed later from her. I will here say that a few hundred dollars have been paid on the mortgage, but that the interest on it will more than cover it, so that more than the entire face of the mortgage is now due. I have certified copies of the assignments to my mother. The originals are in the possession of my mother.

(What purports to be certified copies of the assignments of Thomas E. Wilson to Mary F. Wilson offered in evidence, the same being admitted and filed in evidence and marked respectively Exhibits G and H.)

No part of the advances made to me by mother, for which these assignments were given to her, has been repaid.

Q. Who is in the possession of the property now, and who has been in possession of it since the time of the making of your conveyance to Mrs. Davis?

A. Mrs. Davis is and has been.

Q. Are you still familiar with the property?

A. Yes.

Q. What improvements, if any, has Mrs. Davis put upon the property since she purchased it—of what character and relative location on the property?

112 A. She enclosed the entire property, very shortly after I sold it to her, with a substantial fence; she built one of the finest dwelling-houses in South Florida, costing about $10,000, up to the present time, and cleared up a large additional amount of land, having now about 40 acres cleared and planted in orange and other fruit trees; she built a new barn, laid out drives, had them covered with shell, and made a very handsome flower garden, with the walks covered with shell; brought the orange grove into bearing, planted out a lemon grove, an olive grove, peach trees, pear trees, and all other trees that will grow in that country, so far as known. I will here state that I had, just before selling to her, built a small packing-

house on the property. The improvements are all on the north half of the property, with the exception of the fence, which encloses the whole property; the improvements are on the northeast quarter and the northwest quarter of the southwest quarter of section 30, township 19 south, range 30 east. Mrs. Davis has taken excellent care of the property since it has been in her possession, planting many new trees and budding all the choice varieties of orange trees, and has expended on the property, in addition to the $2,000 she paid me, about $23,000, of which she had spent $20,000, in addition to the $2,000 paid me, before she had notice of and before I had received any message concerning the Symington mortgage from the time I saw Mr. Symington in New York.

Q. What is the condition of the property now, in general terms?

A. The property is in fine condition, the grove is in fine order, considering last winter's cold, and the place is in fine condi-

113 tion generally, with the exception that the house needs painting. The house has been kept insured and the trees fertilized and the taxes all paid regularly since 1879. They have been assessed to Mrs. Davis and paid by her, and she had spent since January, 1884, when she was informed of the Symington mortgage, up to the time of her answer about $3,000 in taking care of and improving the property—more than its income.

Q. Do you or not know, Mr. Wilson, whether Mrs. Davis and her husband have put a second mortgage on this property; and, if so, to whom and for what amount?

A. Yes, sir. They mortgaged the property to D. Appleton & Co., of New York city, for the sum of $15,000.

(Certified copy of the mortgage from Sarah J. Davis and her husband to D. Appleton & Co. offered in evidence, which is filed and marked Exhibit I.)

Q. Independent of your interest in this property as the mortgagee, state how you have knowledge of these matters pertaining to the property and its improvements in the hands of Mrs. Davis.

A. My place is directly opposite, and I see it every day and know of my own knowledge. I have also handled a great deal of the funds personally, as the agent of Mr. and Mrs. Davis.

(It is admitted that on the 29th day of July, 1885, the said J. C. Anderson was duly appointed by the county court of Orange county, sitting as a court of probate, administrator of the estate of Edward J. Wilson, deceased, and is now acting as such.)

114 Cross-examination:

I am the nephew of Edward J. Wilson, who died in New York city unmarried and without issue. My father, who was the sole heir, died intestate in July, 1876. I was twenty-three the October previous to my coming to Florida, in 1871. I had been a practising attorney in New York city. The relations between my uncle and myself were kindly and pleasant and continued to be so up to the time of his death.

(Execution of the bond filed as Exhibit A to bill is admitted by respondents.)

Mrs. Davis lived in the cottage until 1883. She was building the other house for a year or two previous, but she lived in the cottage until the last of the year 1883; since then she has been living in the new house. The foundation of the cottage rotted out again, and she afterwards sold the material in the cottage to me, and I moved it over to my place and used it partly to build a cottage there.

I think Mrs. Davis began to build the new house in the fall of 1881—it may have been in 1882—and she has been superintending and preserving the property ever since Oct., 1879, and from November, 1879, to the present time has been personally living on it.

The taking of testimony here adjourned.

H. H. BUCKMAN, *Master.*

115 AUGUST 6TH, 1886.

The taking of testimony is here resumed.

Present: Respective counsel.

Witness THOMAS E. WILSON further testifies as follows:

(A paper purporting to be a certified copy of the last will and testament of Edward J. Wilson offered in evidence by complainants' solicitor, and it is admitted for the purposes of this suit that the paper was executed and is, as it purports to be upon its face, the last will and testament of Edward J. Wilson. It is further admitted that the same has not been probated in the State of Florida, and it is not known at this date whether it was probated in the State of New York or not, which is filed and marked Exhibit "J.")

Q. You were asked in your examination-in-chief "whether or not the taxes on the property were paid, and, if so, by whom, antecedent to 1879." Your answer covers only the taxes after 1876. Who paid the taxes anterior thereto after you came down to Florida?

A. I did. The taxes were paid from a part of the money advanced that I have referred to in my testimony.

Redirect:

When I completed the bargain with Mr. Earnest for the property and received the deed from him to Edward J. Wilson, which has been offered in evidence, I also received his final homestead receipt showing the payment of the money for the land in full by him to the U. S. Land Office, thus perfecting his claim to the title to the land. I returned this final receipt and the deed from Mr. Earnest to Edward J. Wilson and the deed from Edward J. Wilson to me of the undivided one-half interest. The final receipt was re-
116 turned to the land office upon the discovery of the defalcation of the land officer and the land paid for over again, and in the course of time the patent was made to Edward J. Wilson. The deed from Mr. Earnest to Edward J. Wilson was recorded in November, 1876, because after I saw Mr. Symington in New York

in October, 1876, in our conversation he requested me to put that deed on record so as to show the title, as there was no title of record of any description at that time—that is, at the time of our conversation—as we had made an agreement which would have settled the whole matter if carried out, although Mr. Symington did not sign the agreement nor intend to carry it out, as I was informed before I left New York. I put that deed on record in November, 1876, on my return from New York, as I had promised him to do. The agreement I had made with Mr. Symington and which he afterwards refused and failed to sign was that he was to furnish the money to bring the place along until the grove should bear well and I was to superintend the management of the place and we were to each have a half interest. The reason alleged by the attorney for Mr. Symington for his not perfecting the agreement was as stated yesterday by me, and, further, that Mr. Symington did not think it would pay to cultivate the property. It was absolutely necessary to continue to spend money on the property and bring it forward into a state of good bearing in order to have the property of any value proportionate to the amount already expended on it. This species of property either advances or deteriorates in value, and any cessation of expenditure of money in keeping it carefully cared for, cultivated, and fertilized will make it deteriorate in value. The patent I stated was obtained from Gainesville land office in November, 1875, and remained afterwards in my
117 possession from the time it was delivered to me until I turned it over to Mrs. Davis, when I sold the property to her, and she recorded the patent in November, 1879, at the same time that she recorded my deed to her to the property. I stated yesterday that I first knew of the mortgage in Oct. or November of 1879. I did not know at that time to whom the mortgage had been given, that it had been given for the amount of $13,000, nor upon the entire tract, nor did I know these facts until after my uncle's death, when I learned it from the records in the clerk's office of Orange county, Florida. My information in October or November, 1875, was that the mortgage was for $5,000 and on my uncle's share of the property. I did not see him for about 2 years before his death and knew nothing of this Symington mortgage until after his death. I had a letter in regard to it from Mr. Symington after my uncle's death, and immediately replied, notifying him of my interest in the property and of the advances which I had made and claimed the benefit of. This was in the summer of 1876, before I went North and saw Mr. Symington. I had not been North for about 4 years prior to that time. I will also state that Mr. Charles E. Earnest was in the possession of this land the first time that I went to see it, and I dined with him and his family upon it, but upon my consummating the trade with him, which was done at Ford Reade, he and his family left the land and I went out and took possession of it, he having left it with a hired man, who turned it over to me. He had delivered to me the final receipt and deed, as heretofore mentioned. I omitted to state in my testimony yesterday that I built quite a large house

on the property between 1873 and the latter part of 1875 for
118 the workingmen, with sheds around it for carts, carriages, farming implements, &c.

(A paper purporting to be a letter signed E. J. W., addressed "My Dear Emmet," with the envelope addressed to "Thomas Emmet Wilson," offered in evidence and filed, marked Exhibit "K.")

Q. In whose handwriting is this, and did you receive it, and how?

A. It is my uncle Edward J. Wilson's handwriting. I received it through the mail in Jacksonville in 1871. The initials are in his handwriting and are his initials, and he was in the habit—sometimes, not always—of signing his initials and of addressing me as My Dear Emmet in his communication to me. The direction on the envelope is also in his handwriting.

In my statement that from 1871 to the time of my uncle's death I had expended about $5,000 on the improvements and care and cultivation, of which I had received about $2,000 from Edward J. Wilson, I did not include any charge for my time for my personal supervision and management and for personal labor I bestowed on it, although I had given a great deal of time for these purposes and my co-tenant, Edward J. Wilson, had not given any.

I will state that my uncle was a man of considerable means and was reputed to be of large means at the time of my coming to Florida and previously for a number of years and was not embarrassed in any way by debt. He became embarrassed a few years prior to his death, owing to his large possessions of real estate and the contraction of the panic a few years before his death.

119 Cross-examination:

My uncle was an attorney-at-law at the time of his death. He was at the time of his death, I think, 62 or 63 years old, and to the best of my knowledge he had been practicing law from the earliest of my recollection.

THOS. EMMETT.

Sworn and subscribed before me Aug. 6th, 1886.

H. H. BUCKMAN, *Master.*

120 The complainants, by their solicitors, object and except severally to the several questions propounded on behalf of respondents to Thomas Emmet Wilson, and the several subdivisions of said several questions severally, and the several answers of said witness thereto, and the several subdivisions and several clauses of said several answers severally, said objections and exceptions having been duly and severally made thereto as the same were severally propounded and answered and now herein noted upon the following several grounds of objection and exception severally made to each of said several questions and subdivisions of questions and the said several answers and subdivisions of answers and severally applied to each:

1. Said witness is a party respondent herein.

2. Said James Symington is dead and his executors parties complainant herein.

3. Edward J. Wilson is dead, and his administrator, J. C. Anderson, is a party to said bill.

Said several grounds of objection and exceptions are applied severally to each of the following questions and answers and parts of each, as herein noted:

1. The answer found on page 1 of witness's testimony as follows: "It was then turned over to me by Mr. C. E. Earnest and by his agent," and also because it is shown that said alleged turning over is predicated upon an alleged agreement made by said witness and said Edward J. Wilson.

2. The question on page 2, "How was it that you went upon this property in 1871?" and also because the whole purpose of said question thus addressed to the witness, who is, as shown by the
121 testimony, a practicing lawyer, being to elicit testimony as to an alleged agreement between the said witness and said Edward J. Wilson, deceased, as shown by the answer thereto.

3. The answer on page 2, beginning, "My uncle, Edward J. Wilson, and myself made an agreement by which," etc., down to the words near the bottom of said page, "and got the deed to the property," and severally each clause in said answer.

4. The answer on page 3, "I went upon the property and examined it and liked it and took actual possession of it in March, 1871," and also because said answer is predicated upon said alleged agreement.

5. The answer on page 3, "The deed to Earnest and wife was to have been executed to me, but was," etc., down to "M'ch, 1871," and also because said several claims of said answer are predicated upon said alleged agreement.

6. Answer on page 9 and each subdivision or clause thereof, beginning, "I saw Mr. Symington in October, 1876," etc., down to and including "any claim upon the property by him or them."

7. Question on bottom of page 12, "Do or do you not know, Mr. Wilson, whether Mrs. Davis and her husband have put a second mortgage on their property; and, if so, to whom and for what amount?" upon the ground the existence of a mortgage cannot be established in the manner proposed; and,

8. The answer thereto and the certified copies offered as evidence for the same reason.

9. The entire statement and each several clause therein embraced between the heading "Redirect," near the bottom of page 16, down to the heading "Cross-examination," on page 20, and also
122 because the several statements therein are based on or in terms involved an alleged agreement between said witness and the said decedent, Edward J. Wilson, or said decedent, James Symington.

Aug. 6th, 1886.

H. H. BUCKMAN, *Master.*

Taking of testimony here adjourned.
Aug. 6th, 1886.

H. H. BUCKMAN, *Master.*

123 AUGUST 10TH, 1886.

G. B. DICKENSON, a witness introduced on behalf of the defendants, being duly sworn, deposes and says:

Q. Where do you reside, and what is your occupation?

A. I reside in Orange county, Florida, near Orlando. I suppose I might claim as my occupation that of a fruit-grower. I am now engaged in that business.

Q. How long have you resided in Orange county, and in what portion of the county?

A. I have been in Florida about 17 years; of that time, with the exception of about 1½ years, I resided in Orange county; with the exception of about a year of that time I have lived about 4½ miles south of Sanford.

Q. Do you know a tract of land described as the southwest quarter of section 30, in T. 19 S., R. 30 E.?

A. I do.

Q. Where does this tract of land lie, and how long have you known it?

A. It is — Orange county 6 or 7 miles west from Sanford. I have known of the property nearly ever since I have resided in the State.

Q. By whom was this property occupied when you first knew it?

A. By Charles Earnest.

Q. Do you remember when Thomas E. Wilson took possession of the property?

A. I remember about the time. I think it was about two years after I first saw the property.

124 Q. What improvements were there on the property at the time Mr. Wilson took possession of it?

A. As well as I remember, I think there must have been from 6 to 8 acres cleared and from two to three hundred orange trees planted. The man was also engaged in farming on the place. The trees were young, such as I suppose might be bought then for from 50 to 75 cents apiece.

Q. Were there any buildings on the place?

A. There was a dwelling-house. It was, I think, a frame house or what is called a California house, made out of pine lumber. I suppose it was worth about two hundred dollars.

Q. Who is living upon this property now?

A. Mrs. Davis. I do not recollect her initials.

Q. Do you remember when the property passed out of Mr. Wilson's hands into Mrs. Davis'?

A. I remember the fact. I think about 7 years ago.

Q. What did Mr. Wilson do in the way of improving the property while it was in his possession? State as near as you can.

A. He engaged — the clearing very considerably and put out more trees. He also erected some outbuildings. He went to considerable

cost to fix up the dwelling, both inside and out. He added weather protectors all round in the way of good substantial sheds, and, as I thought, made a new house of it. He also added a kitchen and dining-room to the building. He maintained from two to three animals on the place—horses and mules—and whenever I was there there were always one or two men at work, and everything on the place was kept up and cultivated, the trees fertilized, &c.

125 Q. State, if you please, what was the relative condition of the orange grove at the time the property was transferred to Mrs. Davis and when it came into the possession of Mr. Wilson.

A. The growth of the trees for these years was very good, and I think they had been well cultivated and cared for all the time; the original trees were bearing trees, and there may have been some of those that were planted later bearing as well, but I do not know that positively.

Q. State, now, if you please, what improvements have been made on the property by Mrs. Davis since it came into her possession, as near as you can.

A. Well, I remember particularly that there has been a very commodious residence built, which I suppose cost about 7 or $8,000, perhaps $10,000. I know also that the property has been refenced, and especially on the north side, where an expensive fence has been built. A large number of trees have been set out on the property; and I also know that the grounds have been beautified. She has built a good large barn and laid out a flower garden with walks and laid out drives. She has also built a good large barn, and the whole place seems to have been well kept all the time.

Q. What is the condition of the property at this time?

A. It has been kept up as well as any other property that I know of and is now in good condition.

Q. On what part of the ¼ section are the improvements?

A. On the north ½ of the ¼ section, except the fence, which encloses the whole tract.

Q. Are you familiar with Orange county lands and their relative values?

126 A. I think I am. I was tax assessor for that county for two years.

Q. What difference is there in the character of the north and south half of this ¼ section, not taking into consideration the improvements that have been made on the north ½?

A. Well, I think, upon a careful examination, they are both of the same value naturally.

Q. During what years were you assessor for the county?

A. The years of 1877 & 1878.

Q. Could you state how Thomas E. Wilson returned these lands for those years?

A. He returned his interest as an undivided ½ interest.

Q. Have you had any experience in the cultivation of orange groves on lands similar to these in Orange county?

A. I have, sir.

Q. State then, if you can, what would be the probable cost of the maintenance and development of this grove during the period of time that Mr. Wilson had it in charge annually.

A. Judging from my experience—I had a place about the same size—I should think from $1,000 to $1,200 per year would probably be his expenditure on that place during the time he had it.

Q. What would be the probable expenditure for maintaining the property after Mrs. Davis had possession of it?

A. Well, sir, I should think about $2,000 per year would be the cost of maintaining such a place.

Cross-examination:

127 Q. During your experience as tax collector or assessor for Orange county did you ever assess any other property returned as an undivided ½ interest; and, if so, whose?

(Counsel for defendants objects to this question unless made to apply to the property in issue.)

A. I cannot recollect any other, but I have property assessed to me in that way at this instant. I cannot recollect any property assessed in that way just now except Mr. Wilson's.

Q. You spoke of improvements on this property since Mrs. Davis took possession. Where did you live during the period of time she had possession of the property?

A. I lived about 7 or 8 miles from that property.

Q. Did you have any particular reason for noting the improvements on this particular property?

A. There was no reason except that I had occasion to visit Mr. Wilson as a friend quite often, and I also owned property beyond there, and was frequently passing and repassing.

Q. Was there any special reason why you should note the improvements on this property more than the improvements on other property in similar situations?

A. I suppose there was some reason, because a man always takes an interest in improvements that are going around him in real estate, and because these improvements were on a very different nature from the usual improvements on property in that part of the country.

Q. Did this habitude of mind to look after improvements lead you to look specially after this particular piece of property?

A. I mean that this place was so finely improved as to attract my attention.

128 Q. What I mean to ask you is if this disposition to look after improvements on property led you to look especially after this particular place?

A. I mean that I had my attention directed to it from the fact that it was like an oasis in a desert.

Q. You use the term, like an oasis in a desert. What is the circle of this oasis, and what is the circle of this desert?

A. Well, I mean that this place was improved in such a special

manner as to attract my attention. I used the word desert figuratively.

Q. Did this term, as you say figuratively used, occur to your mind during the time when Mr. Wilson had possession of the property?

A. I think you have misunderstood my meaning entirely. Well, if you were to get into a carriage at Sanford and drive to the Wekivah river, as I have often done on the road, you would see only one place that was improved in such a manner and brought to such a high state and so well kept, and if you were to see a fine house and a large well-kept orange grove, with walks and drives and flower gardens, and there was no other place on the whole road improved in such a manner, you would consider that it was a kind of an oasis in a desert or in a wilderness, and that is the sense in which I used the term. I did not mean that the land around there was a desert, but, as I have said, this was so finely improved.

Q. When did the condition of things begin to exist as to cause it to occur to you that it looked like an oasis in a desert?

A. Well, it was particularly after Mrs. Davis took the place.

Q. When did this condition begin?

129 A. Well, it was more striking after the possession of Mrs. Davis; it begun before.

Q. You stated that 6 or 8 acres were planted in orange trees at the time you first knew the place, did you not?

A. You did not understand me correctly.

Q. What did you say, then?

A. About that amount of land had been cleared and was under cultivation. There were about three hundred orange trees planted out, and the rest of the land was occupied by crops of sugar cane, corn, &c., planted about the place.

Q. Did you not state that the trees that were there when Mr. Wilson took possession were bearing trees when Mrs. Davis took possession?

A. Yes, sir; I could not swear to every one, but they were, as a whole, bearing trees.

Q. Then the grove as a whole was a bearing grove, was it, and had become such since Mr. Wilson took possession of the property?

A. Yes; it had grown to be a bearing grove since Mr. Wilson had possession of it.

Q. You stated that the cost of keeping the grove up was about $2,000 per year for the time Mrs. Davis had possession of the property. Now, state, if you please, what the yearly income would be for the 7 years which you have testified of Mrs. Davis being in possession of the property.

A. I should think that all the larger trees would produce from 3 to 5 boxes each year, but, of course, there were a good

130 many young trees that were not bearing anything. I cannot state how much it would be in dollars and cents.

Q. What would be the probable outlay for the 7 years that Mrs. Davis has had possession? I think you said $2,000, did you not?

A. I said that to cultivate the trees in the manner in which they

have been it would take about that amount for each year during that period of time.

Q. Is it not as easy to tell the amount of the yield as it is to tell how much it was necessary to expend?

A. No, sir; one can tell at a glance the general condition of a grove, but in order to determine the yield it is necessary to be familiar with the trees and to go through them when they have a crop on and to make careful calculations.

Q. Do groves properly maintained after 7 years usually yield any income?

A. Sometimes they do and sometimes they do not.

Q. Can you not give an idea as to the yield of this grove?

A. I am not intimately enough acquainted with it to do that. All I know is that in passing and repassing, and when I called on Mr. Wilson it always looked to be well kept, but I have no information as to the crop.

GEO. B. DICKENSON.

Sworn to and subscribed before me this Aug. 10th, 1886.

H. H. BUCKMAN, *Master*.

131 Mrs. S. J. DAVIS, another witness introduced on behalf of defendants, being duly sworn, deposes as follows:

Q. Are you a party to this suit, one of the defendants?

A. Yes, sir.

Q. Where do you reside?

A. At Sylvan Lake, Orange county, Florida.

Q. Do you know a tract of land described as the southwest quarter of section 30, in township 19 S., R. 30 E.?

A. Yes, sir; I do. It is the property I live on.

Q. How long have you lived there?

A. 7 years, I believe it is; 7 years next September.

Q. From whom did you purchase this property?

A. From Mr. Thomas Emmet Wilson.

Q. What was the condition of the property at the time you purchased it from Mr. Wilson? I refer to the trees particularly—the orange trees.

A. There were about 600, I think. About 300 of them were bearing. I cannot say how much land was cleared. There was a fence around part of the land. The whole grove was under fence. There was a cottage, three or four stables, and a packing-house—a very good building.

Q. Who was in possession of the property when you first saw it?

A. Mr. Thomas Emmet Wilson.

Q. What was the character of his possession, and do you know whether or not he claimed the property as his own?

A. Yes, sir; he claimed it as his own, and wherever I went I heard it spoken of as his property.

132 Q. From whom did you purchase the property, if you did purchase it, and what consideration did you pay for it?

A. I purchased it from Mr. Thomas Emmet Wilson, and paid him $8,000.00—$2,000 in cash and $6,000 on mortgage.

Q. When did you take possession of the property relatively to the time you purchased from Mr. Wilson?

A. I took possession, I think, about the month of October, 1879. My purchase was made the September next preceding.

Q. Have you or not been in the actual possession of the property from that time up to the present time? And state whether or not you have exercised control of the property since the time of the purchase.

A. I have occupied the premises ever since I purchased, except when I go North in the summer for a few months.

Q. State, if you please, what improvements you have put upon the property since you purchased it.

A. I have built a house and a barn. I have laid out a flower garden, and have put a fence around the entire tract of 143 acres. I have set out, I suppose, about 1,200 trees—orange trees and other fruit trees. I have fertilized and cultivated these trees, and have had about 250 barrels of shell hauled on my drives and walks.

Q. What kind of a house have you built upon the property, and what approximately has been the cost of it?

A. The building is a large three-story house and contains 13 rooms, and cost between $9,000 and $10,000.

Q. What is the condition of the building at this time? Is it in good repair?

133 A. It is in very good repair.

Q. When was it erected?

A. It will be three years ago in October since it was built.

Q. What kind of a fence have you around the entire property and what is the character of the interior fences?

A. The fence around the entire property is a wire fence, with a board at the top; 2 strands of wire. The interior fence is a wire fence; two strands of wire. The fence on the north and ½ of the west side is a picket fence. This is an outside fence.

Q. What other buildings, if any, have been erected since you purchased the property?

A. I have not built any except the house and barn.

Q. What kind of a barn have you built?

A. It is quite a large barn; 4 stalls and carriage-room, a hay mow and feed-rooms.

Q. Have you or not kept up any of the buildings that were on the property when you purchased it?

A. I have not kept up any except the packing-house.

Q. What kind of land naturally was this; was it hummock or pine?

A. Pine.

Q. State whether or not, in order to develop your orange grove and the large number of trees which you have planted, it was necessary to supply fertilizers liberally on the soil; and, if so, what you have done in this way.

A. The land is good, but at the same time I have to fertilize. I

fertilized all the trees with commercial fertilizer and muck, and I have had the grove cow-penned—that is, the old grove.

134 Q. What has been the growth of the trees since you have owned the property, and what is the present condition of the grove?

A. The groves are in very good condition. They have grown well and are now of good size.

Q. How many bearing trees would you say there are on the place at this time?

A. From 800 to 1,000.

Q. In addition to the cost of the dwelling-house and barn, what amount have you expended in the improvement of this property since you owned it?

A. I should say about $13,000.

Q. State now, if you please, Mrs. Davis, as near as you can, what you have received in the way of net returns for the sale of oranges that have been raised upon this property?

A. I do not believe I can answer that question, but should say from $150 to $500 a year. I lost most of the crops last winter by the cold.

Q. Is your husband living, and is he or not a party to this suit, and if living where is he living?

A. He is living in New York; he is a party to this suit.

Q. When you purchased this property did you know anything about there being a mortgage upon it?

A. When I bought it I thought I was making a *bona fide* purchase.

Q. When did you first have any information as to the mortgage which is set up in this proceeding—that is, the Symington mortgage?

A. About the first of January, 1884, as near as I recollect.

135 Q. What proportion of the improvements that you have put upon this property had you put upon it before that time?

A. The house and barn had been built and all of the trees were planted before that time. I have not planted any since, unless it was ornamental trees. The fences were built also before that time.

Q. On what portion of this ¼ section are the improvements?

A. They are all on the north ½ except the fence which has been put around the entire tract.

Q. Is there any difference in the value of the north ½ and the south ½ of the entire tract in its natural condition?

A. I do not think there is any difference.

Q. You stated that you had given a mortgage to Mr. Thomas Emmett Wilson for a part of the purchase-money of this property. Has this mortgage been paid?

A. No, sir.

Q. State if you have ever mortgaged this property again; and, if so, to whom and for what amount.

A. I have mortgaged it for the amount of about $1,500 to Mr.

Thomas Emmett Wilson; I have also mortgaged it to the firm of D. Appleton & Co. for the amount of $15,000.

Q. About what time did you put a fence around the entire tract to which you have testified?

A. I think it was in the early spring of 1880.

S. J. DAVIS.

No cross-examination.

136 Taking of testimony here adjourned.

Sworn to and subscribed before me this 10th day of August, A. D. 1886.

H. H. BUCKMAN, *Master.*

The complainants, by their solicitors, A. W. Cockrell & Son, except and object to the testimony of Sarah I. Davis and each and every part thereof upon the ground that said witness is not a competent witness in this cause. Insisting upon this exception and objection to the competency of said witness, which said objections and exceptions were made and noted by the master herein prior to the taking of said testimony, the complainants decline to examine said witness.

H. H. BUCKMAN, *Master.*

Taking of testimony here closed.

H. H. BUCKMAN, *Master.*

Endorsement: In U. S. circuit court, 5th circuit, northern dist. of Fla. In chancery. G. W. Faber *et al. vs.* J. C. Anderson *et al.* Report of master and testimony. Filed August 19th, 1886. Philip Walter, clerk, by Jno. S. Driggs, dep. cl'k. H. H. Buckman, master.

137 In the United States Circuit Court, Fifth Circuit, Northern District of Florida.

GUSTAVUS W. FABER and JAMES S. WATT, Executors of James Symington, Deceased,
vs.
THOMAS C. ANDERSON, Administrator, &c., *et al.*

It is ordered, adjudged, and decreed that the bill of complaint herein be amended by striking out — the address of said bill the words "Gustavus W. Faber and James S. Watt, both of the city and State of New York and citizens of the State of New York," and inserting therein as follows: "Gustavus W. Faber, of the city and State of New York and a citizen of the State of New York, and James S. Watt, a subject of the Kingdom of Great Britain, temporarily residing in the city of New York."

In this cause, it appearing to the court that letters testamentary on the estate of James Symington, deceased, heretofore issued to Gustavus W. Faber, deceased, one of the complainants herein suing as one of the executors of James Symington, deceased, *has* been revoked, as is shown by a duly exemplified copy of the records of

the surrogate court of the county of New York, State of New York, filed herein, it is therefore ordered, adjudged, and decreed, on motion of complainants herein, that this cause proceed in the
138 name of the said James S. Watt, sole surviving executor of James Symington, deceased, and that it be discontinued as to said Gustavus W. Faber, suing as co-executor.

Dec. 20, 1886.

THOMAS SETTLE, *Judge.*

The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the surrogate of the county of New York, do find a certain decree in the matter of the application of Gustavus W. Faber for a revocation of the letters testamentary issued to him as one of the executors of the last will & testament of James Symington, deceased, there remaining, in the words and figures following, to wit:

At a surrogate's court, held in and for the county of
[SEAL.] New York, at the county court-house, in the city of New York, on the 4th day of May, 1886.

Present: Hon. Daniel G. Rollins, surrogate.

139 In the Matter of the Application of GUSTAVUS W. FABER for a Revocation of the Letters Testamentary Issued to Him as One of the Executors of the Last Will and Testament of James Symington, Deceased.

Letters testamentary on the will of James Symington, late of the city of New York, deceased, having been heretofore issued by this court on the 29th day of September, 1877, to Gustavus W. Faber and James S. Watt, as executors, and the said Gustavus W. Faber having, on the 4th day of May, 1886, filed a petition in the office of said surrogate praying that a decree be made revoking said letters as to him, and that a due citation be issued requiring the necessary parties to show cause why the petition should not be granted, and all of said parties having, by attorney or in person, duly filed with said surrogate a waiver in writing of the issue and service of such citation, and it satisfactorily appearing to the surrogate that none of the money, books, papers, or other property of the estate of said James Symington are in the hands of said Gustavus W. Faber:

Now, upon motion of Edward B. Hill, Esq., attorney and of counsel for said Gustavus W. Faber, it is ordered, adjudged, and decreed that the said letters heretofore issued to Gustavus W. Faber as such executor be, and same hereby are, as to him revoked.

DANIEL G. ROLLINS, *Surrogate.*

Endorsement: Surrogate's court, city & county of New
140 York. In the matter of the estate of James Symington, deceased. Exemplified copy decree revoking letters. Edward B. Hill, attorney for petitioner, 58 Wall St.

Form 59.

All which we have caused by these presents to be exemplified and the seal of our said surrogate's court to be hereunto affixed.

Witness Daniel G. Rollins, surrogate, at the city of New York, the fifth day of May, in the year of our Lord one thousand eight hundred and eighty-six — of our Independence the one hundred and tenth.

[SEAL.] AUSBURN M. DICKINSON,
Clerk of the Surrogate's Court.

I, Daniel G. Rollins, surrogate of said county and presiding magistrate of the surrogate's court, do hereby certify that Ausburn M. Dickinson, whose name is subscribed to the preceding exemplification, is the clerk of the said surrogate's court of the county of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said surrogate's court, and that the attestation thereof is in due form.

Dated New York, May 5th, 1886.

DAN. G. ROLLINS, *Surrogate.*

141 STATE OF NEW YORK, }
City & County of New York, } *ss.:*

I, Ausburn M. Dickinson, clerk of the surrogate's court of the county of New York, do hereby certify that Daniel G. Rollins, whose name is subscribed to the preceding certificate, is the presiding magistrate of the surrogate's court of the county of New York, duly elected, sworn, and qualified, and that the signature of said magistrate to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 5th day of May, 1886.

[SEAL.] AUSBURN M. DICKINSON,
Clerk of the Surrogate's Court.

Endorsement: Surrogate's office, county of New York. In the matter of the estate of James Symington, deceased. Exemplified copy of decree. Filed 4th of May, 1886. In U. S. c't c't, 5th circuit, Florida. G. W. Faber & Jas. S. Watt, ex's, &c., James Symington, dec'd, *vs.* Thomas C. Anderson, ad., *et al.* Decree amending parties to bill. Filed Dec. 21, 1886. Philip Walter, clerk.

142 The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the surrogate of the county of New York, do find a certain last will and testament of Edward J. Wilson, deceased, together with the probate thereof and the letters granted thereon, there remaining in the words and figures following, to wit:

Be it remembered that heretofore, to wit, on the nineteenth day

of May, in the year one thousand eight hundred and seventy-six, Hugh C. Wilson, of Peekskill, N. Y., an executor named in the last will and testament of Edward J. Wilson, late of the county of New York, deceased, appeared in open court before Delano C. Calvin, surrogate of the county of New York, and made applicatiion to have the said last will and testament, which relates to both real and personal estate, proved; and on such application the surrogate did ascertain, by satisfactory evidence, that said applicant was the only heir and next of kin of said deceased and of full age, and on that day, no one appearing to oppose the probate of said will, such proceedings were thereupon had afterwards that said surrogate took the proofs of said will hereinafter set forth, and upon this nineteenth day of May, in the year one thousand eight hundred and seventy-six, he adjudged said will to be a valid will of real and personal estate and the proofs thereof to be sufficient, which said last will and testament and proofs are as follows—that is to say:

143 In the name of God, amen.

I, Edward J. Wilson, of the city of New York, counsellor-at-law, being of lawful age and of sound mind and memory and mindful of the uncertainty of human life, do make, publish, and declare this my last will and testament in manner following—that is to say:

First. I declare it to be my will and intention that all my estate, both real and personal, of whatsoever nature or kind and wheresoever situated, whereof I am now seized and possessed or whereof I may be seized and possessed at the time of my death, shall pass under and by virtue of this my last will and testament.

Item. I direct my executors, hereinafter named, and the survivors and survivor of them to pay all my just debts.

Item. I give and bequeath unto my brother, Hugh C. Wilson, the sum of one thousand dollars, my portrait of my mother, and engraving of my granduncle, all my breast-pins, all my wardrobe of every description, all my writing-desks, and all my private papers.

Item. I give and bequeath to my nephew, Edward C. Wilson, my gold watch that descended to me from my grandfather, my own gold watch and chain, my silver goblet and the morocco case — which it is kept, and my silver cup marked "E. J. W."

Item. I give and bequeath to my nephew, Thomas Emmet Wilson, my two large silver spoons and the small silver spoon which I keep with them, one silver butter knife, and one silver strainer, and I also give and bequeath unto my said nephew, Thomas Emmet Wilson, the sum of five hundred dollars (having heretofore given and conveyed to him an equal undivided half part of my farm and orange grove near Sylvan Lake, in Orange county, in the State of Florida).

144 Item. I give and bequeath to my niece, Sara C. Wilson, six silver tablespoons, six silver dessert-spoons, and five silver teaspoons.

Item. I give and bequeath unto my niece, Mary M. Wilson, six silver tablespoons, six silver dessert-spoons, and four silver teaspoons.

Item. I give and bequeath unto my sister-in-law, Mary Frances Wil
son, the policy of insurance on my life, effected by me in the Knicker
bocker Life Insurance Company of the City of New York, for ten
thousand dollars, which I have assigned to her, but which and al
monies that may be payable by virtue thereof I thus give and be
queath to her in confirmation of my having effected the same for
her benefit.

Item. I give and bequeath to my friend, Miss Lydia Emmet (o
New Rochelle, N. Y.), the sum of five hundred dollars.

Item. I give and bequeath to my godson, Edward Wilson Dit
mars, the sum of one hundred dollars.

Item. I direct my said executors or the survivor of them to
divide all the rest, residue, and remainder of my estate, both real
and personal, of whatsoever nature and kind or wheresoever situate
which I now own or hereafter may acquire or which I may be seized
or possessed of at the time of my death, into five equal parts or shares
One of said five equal parts or shares I give and bequeath and de-
vise unto my nephew, Edward C. Wilson; to have and to hold the
same to him and his heirs, executors, and administrators forever. Two
other of said five equal parts or shares I give and bequeath and devise
unto my brother, Hugh C. Wilson, and to my nephew, Edward
145 C. Wilson, and to the survivor of them; to have and to hold
the same to them and the survivor of them, upon the trusts
nevertheless, and upon the uses, intents, and purposes and with the
powers hereinafter mentioned and declared of and concerning the
same—that is to say, in trust to enter upon and take possession of
said premises and every part and parcel thereof, and have, take, col-
lect, and receive the rents, issues, income, and profits thereof, and
pay over and apply the same as the same may accrue to the use of
my said niece, Sara C. Wilson, during her natural life, and on her
death to convey, assign, and transfer the said premises to any per-
son or persons whom my said niece, Sara C. Wilson, may name,
limit, or appoint in and by her last will and testament or any in-
strument in writing in the nature thereof. The remaining other two
of said five equal parts or shares I give, bequeath, and devise unto
my said brother, Hugh C. Wilson, and my said nephew, Edward C.
Wilson, and to the survivor of them; to have and to hold the same
to them and the survivor of them, upon the trusts, nevertheless, and
upon the uses, intents, and purposes and with the powers hereinafter
mentioned and declared of and concerning the same—that is to say,
in trust to enter upon and take possession of said premises and
every part and parcel thereof, and have, take, collect, and receive
the rents, issues, income, and profits thereof, and pay over and ap-
ply the same as the same may accrue to the use of my said niece
Mary M. Wilson, during her natural life, and on her death to con
vey, assign, and transfer the said premises to any person or persons
whom my said niece, Mary M. Wilson, may name, limit, or appoint
in and by her last will and testament or any instrument in writing
in the nature thereof.

146 Item. To enable my said executors or the survivor of them
to carry into effect this my last will and testament and to pa

the legacies hereinbefore mentioned I hereby authorize and empower my said executors or the survivor of them, in their or his discretion, to sell, either at public auction or private sale and either for cash or on credit or partly for cash and partly for credit, all or any part of any real estate whereof I am now seized or may be seized at the time of my death.

Item. I hereby authorize and empower the said trustees of the several trusts hereinbefore enacted by me or the survivor of them, in their or his discretion, to sell, either at public auction or at private sale and either for cash or on credit or partly for cash and partly for credit, all of the real estate or any part thereof conveyed to them in trust, and to have and to hold the proceeds of the sale of the said real estate and the same to invest and reinvest and pay over and distribute under and by virtue of and according to the said several trusts.

Item. I do hereby nominate and appoint my dearly beloved brother, Hugh C. Wilson, and my nephew, Edward C. Wilson, executors of and trustees under this my last will and testament, hereby revoking all other and former wills made by me.

In witness whereof I have hereunto set my hand and seal this fifteenth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

EDW. J. WILSON. [L. S.]

The above instrument in writing was at the date thereof signed, sealed, published, and declared by the said testator, Edward
147 J. Wilson, to be his last will and testament in the presence of each of us, who, at his request and in his presence and in the presence of each other, have respectfully subscribed our names as attesting witnesses to the execution of the said last will and testament.

CHARLES MOTT,
No. 128 East 111th Street, New York City.
B. RUSH STODDARD,
323 East 124th Street, New York City.
EDMUND A. FIXMAN,
50 Allen Street, New York City.

Surrogate's Court, County of New York.

In the Matter of Proving the Last Will and Testament of EDWARD J. WILSON, Deceased, as Will of Real and Personal Property.

COUNTY OF NEW YORK:

Examination of witnesses sworn and examined in the above-entitled matter, to wit:

CHARLES MOTT, of the city of New York, being duly sworn as a witness in the above-entitled matter and examined on behalf of the application to prove said will, says:

I was well acquainted with Edward J. Wilson, now deceased. I

knew the above-named decedent for about six years before his death. The subscription of the name of said decedent to the instrument now shown to me and offered for probate as last will and testament and bearing date the fifteenth day of April, in the year one thousand eight hundred and seventy-five, was made by the decedent, at
148 the city of New York, in the presence of myself, B. Rush Stoddard, & Edmund A. Fixman, the other subscribing witnesses. At the time of such subscription the said decedent declared the said instrument so subscribed by him to be his last will and testament, and I thereupon signed my name as a witness at the end of said instrument at the request of said decedent and in his presence.

The said decedent, at the time of so executing said instrument, was upwards of the age of twenty-one years and of sound mind, memory, and understanding and not under any restraint or in any respect incompetent to devise real estate. I also saw said B. Rush Stoddard and Edmund A. Fixman, the other attesting witnesses, sign their names as witnesses at the end of said will and know that they did so at the request of said decedent and in his presence.

CHARLES MOTT.

Sworn this 19th day of May, 1876, before me—

DELANO C. CALVIN, *Surrogate.*

149 Surrogate's Court.

In the Matter of Proving the Last Will and Testament of EDWARD J. WILSON, Deceased, as Will of Real and Personal Property.

COUNTY OF NEW YORK:

Examination of witnesses sworn and examined in the above-entitled matter, to wit:

B. RUSH STODDARD, of the city of New York, being duly sworn as a witness in the above-entitled matter and examined on behalf of the applicant to prove said will, says:

I was well acquainted with Edward J. Wilson, now deceased. I knew the above-named decedent for fifteen years before his death. The subscription of the name of the said decedent to the instrument now shown to me and offered for probate as his last will and testament and bearing date the fifteenth day of April, in the year one thousand eight hundred and seventy-five, was made by the decedent, at the city of New York, in the presence of myself, Charles Mott, & Edmund A. Fixman, the other subscribing witnesses. At the time of such subscription the said decedent declared the said instrument so subscribed by him to be his last will and testament, and I thereupon signed my name as a witness at the end of said instrument at the request of said decedent and in his presence.

The said decedent, at the time of so executing said instrument, was upwards of the age of twenty-one years and of sound mind, memory, and understanding and not under any restraint or in any

respect incompetent to devise real estate. I also saw said
150 Charles Mott and Edmund A. Fixman, the other attesting witnesses, sign their names as witnesses at the end of said will and know that they did so at the request of said decedent and in his presence.

B. RUSH STODDARD.

Sworn this 19th day of May, 1876, before me—
DELANO C. CALVIN.

Surrogate's Court, County of New York.

In the Matter of Proving the Last Will and Testament of EDWARD J. WILSON, Deceased, as a Will of Real and Personal Property.

COUNTY OF NEW YORK:

Examination of witnesses sworn and examined in the above-entitled matter, to wit:

EDMUND A. FIXMAN, of city of New York, being duly sworn as a witness in the above-entitled matter and examined on behalf of the applicant to prove said will, says:

I was well acquainted with Edward J. Wilson, now deceased. I knew the above-named decedent for about four years before his death. The subscription of the name of said decedent to the instrument now shown to me and offered for probate as his last will and tes-
151 tament and bearing date the fifteenth day of April, in the year one thousand eight hundred and seventy-five, was made by the decedent, at the city of New York, in the presence of myself, B. Rush Stoddard, and Charles Mott, the other subscribing witnesses. At the time of such subscription the said decedent declared the said instrument so subscribed by him to be his last will and testament, and I thereupon signed my name as a witness at the end of said instrument at the request of said decedent and in his presence.

The said decedent, at the time of so executing said instrument, was upwards of the age of twenty-one years and of sound mind, memory, and understanding and not under any restraint or in any respect incompetent to devise real estate. I also saw said B. Rush Stoddard & Charles Mott, the other attesting witnesses, sign their names as witnesses at the end of said will and know that they did so at the request of said decedent and in his presence.

EDMUND A. FIXMAN.

Sworn this nineteenth day of May, 1876, before me—
DELANO C. CALVIN, *Surrogate.*

152 At a surrogate's court held in and for the county of New York, at the surrogate's office, in the city of New York, on the 19th day of May, in the year 1876.

Present: Delano C. Calvin, Esq., surrogate.

In the Matter of the Proving the Last Will and Testament of EDWARD J. WILSON, Deceased.

The citation in this matter having been duly waived by the next of kin, — were such proceedings thereupon had that the [SEAL.] proofs were duly taken, and, the allegations of the parties appearing having been heard, it is decided, ordered, adjudged, and decreed that the instrument offered for probate in this matter is the last will and testament of the said testator, and as such is valid as a will of real and personal estate, and the same is hereby admitted to probate as a will of real and personal estate.

D. C. CALVIN, *Surrogate.*

153 COUNTY OF NEW YORK, *ss:*

Recorded the preceding last will and testament of Edward J. Wilson, deceased, as a will of real and personal estate, together with the proofs and examinations taken and had in the court of the surrogate of the county of New York to the said last will and testament, which said record is hereby signed and certified by me, pursuant to the provisions of the revised statutes, the nineteenth day of May, in the year one thousand eight hundred and seventy-six.

[SEAL.] DE LANO C. CALVIN, *Surrogate.*

154 The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or whom they may concern, send Greeting:

Know ye that at the county of New York, on the nineteenth day of May, in the year of our Lord one thousand eight hundred and seventy-six, before Delano C. Calvin, Esq., surrogate of our said county, the last will and testament of Edward J. Wilson, deceased, was proved and is now approved and allowed by us, and, the said Edward J. Wilson being at or immediately previous to his death an inhabitant of the county of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels, and credits of the said testator, and also the auditing, allowing, and final discharging the account thereof, doth belong unto us the administration of all and singular the goods, chattels, and credits of the said deceased and any way concerning his will is granted unto Edward C. Wilson and Hugh C. Wilson, both of Peekskill, Westchester county, New York, executors in the said will named, they being first duly sworn faithfully and honestly to discharge the duties of such executors.

In testimony whereof we have caused the seal of office of our said the surrogate to be hereunto annexed.

Witness Delano C. Calvin, Esq., surrogate of our said county, at the city of New York, the 19th day of May, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the one hundredth.

[L. S.] D. C. CALVIN, *Surrogate.*

155 All which we have caused by these presents to be exemplified and the seal of our said surrogate's court to be hereunto affixed.

Witness Daniel G. Rollins, surrogate, at the city of New York, the eleventh day of August, in the year of our Lord one thousand eight hundred and eighty-six, of our Independence the 111th.

[SEAL.] AUSBURN M. DICKINSON,
Clerk of the Surrogate's Court.

I, Daniel G. Rollins, surrogate of said county and presiding magistrate of the surrogate's court, do hereby certify that Ausburn M. Dickinson, whose name is subscribed to the preceding exemplification, is the clerk of the said surrogate's court of the county of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said surrogate's court, and that the attestation thereof is in due form.

Dated New York, August 11th, 1886.

DAN. G. ROLLINS, *Surrogate.*

STATE OF NEW YORK, *City and County of New York,* } *ss.:*

I, Ausburn M. Dickinson, clerk of the surrogate's court of the county of New York, do hereby certify that Daniel G. Rol-
156 lins, whose name is subscribed to the preceding certificate, is the presiding magistrate of the surrogate's court of the county of New York, duly elected, sworn, and qualified, and that the signature of said magistrate to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 11th day of August, 1886.

[SEAL.] AUSBURN M. DICKINSON,
Clerk of the Surrogate's Court.

Endorsement: Surrogate's office, county of New York. In the matter of the estate of Edward J. Wilson, deceased. Exemplified copy of will, &c. Introduced at the hearing by respondents in open court and filed this 12th day of January, 1887. Philip Walter, clerk.

157 In the United States Circuit Court, Fifth Circuit, Northern District of Florida.

JAMES S. WATT, Executor of James Symington, Deceased, Complainant,
vs.
J. C. ANDERSON, Administrator of Edward J. Wilson, Deceased, *et al.*

This cause, coming on to be again heard, was submitted for final decree upon the pleadings and the exhibits thereto, the report of the master appointed to take testimony, the stipulations of counsel, and the duly certified copy of the will of Edward J. Wilson, deceased, with the probate thereof in the surrogate's court of the State and

county of New York, introduced at the hearing by the respondents herein, and was argued by the solicitors of record of the respective parties, and the court took the said cause under advisement; and this court having duly considered said matters and being now advised of the decree to be rendered herein, it is ordered, adjudged, and decreed as follows:

1st. That the defendant, J. C. Anderson, as the administrator of the estate of Edward J. Wilson, deceased, and in his capacity as such administrator, is justly indebted to the complainant as the sole acting executor of the last will and testament of James Symington, deceased, in the sum of thirteen thousand ($13,000.00) dollars, principal, and ten thousand eight hundred and eighty-seven $\frac{13}{100}$
158 ($10,887.13) dollars, interest, making in all twenty-three thousand eight hundred eighty seven $\frac{13}{100}$ ($23,887.13) dollars, and that said complainant holds a mortgage lien to secure the said principal and interest hereby adjudicated and declared in his favor upon an undivided one-half interest in and to the following lands:

All that tract and parcel of land situate, lying, and being in the county of Orange and State of Florida and known and designated in the survey of public lands as the southwest quarter (S. W. qr.) of section thirty (sec. 30), in township nineteen south (T. 19 S.) of range thirty east (R. 30 E.), containing one hundred and sixty acres.

2. That the lien herein declared be enforced by a sale of the said undivided one-half interest on the 1st Monday in March, 1887, unless the said sum be paid to complainant before said day of sale.

3. That John S. Driggs be, and is hereby, appointed master *pro hac vice* to advertise, conduct, and make such sale, having first given thirty days' notice of the time, place, and terms of sale in some newspaper published in said county of Orange.

4. That said sale be had before the court-house door in Jacksonville, and that the terms thereof be cash. The complainant, however, is permitted to bid at such sale to the extent of the sum herein adjudged to be due him.

159 5. That said master make report of his acts and doings herein with all convenient speed to this court.

January 19, 1887.

THOMAS SETTLE, *Judge.*

Endorsement: Filed Jan. 19, 1887. Philip Walter, clerk.

160 JAMES S. WATT, Executor of James Symington, Deceased, Complainant,
vs.
J. C. ANDERSON, Administrator of Edward J. Wilson, Deceased, *et al.*

In this cause it is ordered, adjudged, and decreed as follows:

The original decree of sale entered herein January 19, 1887, in paragraph three thereof, be amended so that Wm. Capers Bird be, and he is hereby, substituted for John S. Driggs, therein appointed master *pro hac vice* to advertise, conduct, and make such sale.

From records U. S. circuit court.

161 In the Circuit Court of the Fifth Judicial Circuit of the United States in and for the Northern District of the State of Florida. In Chancery.

JAMES S. WATT, Executor of James Symington, Deceased,
vs.
J. C. ANDERSON, Administrator, etc., *et al.*, Defendants.

Report of William Capers Bird, Master pro Hac Vice.

In pursuance to the decrees rendered herein I, the undersigned, William Capers Bird, as master *pro hac vice*, do hereby report as follows:

1. That I gave thirty days' previous public notice, by advertisement in the Sanford Journal, a newspaper published daily at Sanford, in said county of Orange, and the publisher's certificate of advertisement, hereto attached, marked Exhibit A, is hereby prayed to be taken as part hereof.

2. That this the seventh day of March, 1887, the first Monday of said month, during the legal hours of sale, before the court-house door of said court, at the said city of Jacksonville, I, at public outcry, did offer said land for sale to the highest bidder, for cash.

162 3. That then and there the said complainant, James S. Watt, executor of James Symington, deceased, being the highest and best bidder, purchased said land at and for the sum of three thousand dollars, said sum being the highest bid made.

Respectfully submitted.

W. C. BIRD,
Master pro Hac Vice.

Endorsement: U. S. circuit c't. Chancery. Watt, ex., etc., *vs.* Anderson, adm'r, etc., *et al.* Report of W. C. Bird, master *pro hac vice*. Filed Mar. 21, 1887. Philip Walter, clerk.

163 In the Circuit Court of the United States, Fifth Circuit, in and for the Northern District of Florida.

JAMES S. WATT, Executor of James Symington, Deceased, Complainant,
vs.
J. C. ANDERSON, Administrator of Edward J. Wilson, Deceased, *et al.*

This cause coming on to be again heard upon the report of the master heretofore appointed by decree of this court to sell the premises therein described and to make report of sale to this court and no objection or exception having been filed to said report of sale, it is now ordered, adjudged, and decreed by this court that said sale be, and the same hereby is, in all things confirmed and said master is directed to execute to the purchaser a proper deed of conveyance in accordance with his said purchase.

The clerk of this court will, on application of the purchaser, issue

a writ of assistance commanding the marshal of this court to put the purchaser in possession of the said premises.

It is further considered and decreed by the court that complainant recover of the defendants herein his costs in this behalf expended, to be taxed by the clerk of this court.

March 30th, 1887.

THOMAS SETTLE, *Judge.*

Endorsement: Decree conferring master's report. Filed Mar. 30, 1887. Philip Walter, clerk.

164 In the U. S. Circuit Court, 5th Circuit, Northern District of Florida.

JAMES S. WATT, Executor of James Symington,
vs.
ANDERSON, Adm'r of Wilson, *et al.*

On motion of Fleming and Daniel, solicitors for defendants, it is ordered that the decree heretofore made, to wit, on the 31st day of March, 1887, confirming master's report of sale and decreeing costs, be, and the same is hereby, set aside, and defendants have leave to file exceptions to master's report.

March 31, 1887.

THOMAS SETTLE, *Judge.*

165 In the United States Circuit Court, 5th Judicial Circuit, Northern District of Florida.

JAMES S. WATT, Executor of James Symington, Pl't'f,
vs.
J. C. ANDERSON, Adm'r of Edw. J. Wilson, Dec'd, *et al.*

Now come the defendants, by Fleming & Daniel, their solicitors, and move that the sale as reported by the marshal of this court be not confirmed for the following reasons:

1st. That the decree directs the sale to be made by John S. Driggs, Esq., as special master.

2nd. That there is no order or decree authorizing or directing the marshal to make the sale.

3rd. That the decree directs John S. Driggs, Esq., to advertise and sell the property and the marshal advertises and sells.

4th. That the marshal reports the sale of a one-half interest in the lands, which, if confirmed without qualification, it is claimed will authorize a deed to the purchaser of one-half of the improvements, which was not so intended by the court.

FLEMING & DANIEL,
Solicitors for Defendants.

Endorsement: In the United States circuit court, 5th judicial circuit, northern district of Florida. James S. Watt, executor of James Symington, pl't'f, *vs.* J. C. Anderson, adm'r of Edw. J. Wilson, dec'd,

et al. Objections to the confirmation of sale as reported. Filed Apr. 5, 1887. Philip Walter, clerk. Fleming & Daniel, defendants' solicitors.

166 In Cir't Court U. S., Nor. Dis. of Florida. In Equity.

WATTS, Ex'r of Symington, Complainant,
vs.
THOS. E. WILSON *et al.*

This cause, coming on again to be heard upon the report of the master appointed by the decree of this court to sell the premises, to satisfy the lien therein declared and admitted, and the objections and exceptions to said sale and said report, *and* was argued by the counsel of the respective parties; whereupon it is ordered, adjudged, and decreed that the report of said master and the said sale are in all things confirmed.

2. It is further ordered that the costs of this suit be taxed one-half to the complainants and one-half to the defendants herein.

3. The final decree herein is so far modified as to allow the defendants to file a supersedeas bond herein by the first day of June, 1887.

4. The defendants herein having in open court prayed an appeal to the Supreme Court of the United States, said appeal is hereby granted and the supersedeas bond fixed by the court at the sum of five thousand dollars, to be properly secured and conditioned and payable as required by law.

167 5. Upon the failure to make and file said supersedeas bond by the time herein limited the said master will execute and deliver to the purchaser at said master's sale a deed in accordance with his said purchase.

April 12, 1887.

THOMAS SETTLE, *Judge.*

Endorsement: Watt, ex'r of Symington, *vs.* T. S. Wilson *et al.* Decree confirming sale. Filed Apr. 12, 1887. Philip Walter, clerk.

168 In the Circuit Court of the United States for the Northern District of Florida.

AUGUSTUS W. FABER and JAMES S. WATT, as Executors of the Last Will and Testament of James Symington, Deceased,
vs.
J. C. ANDERSON, as Administrator of the Estate of Edward J. Wilson, Deceased; Thomas Emmett Wilson, Sarah J. Davis, and George W. Davis.

Know all men by these presents that we, J. C. Anderson, as administrator of the estate of Edward J. Wilson, deceased; Thomas Emmett Wilson, Sarah J. Davis, and George W. Davis, as principals, and Nat. Poyntz and T. J. Shine, as sureties, are held and firmly bound unto Augustus W. Faber and James S. Watt, as exec-

utors of the last will and testament of James Symington, deceased, in the sum of five thousand dollars, to be paid to the said Augustus W. Faber and James S. Watt, as executors of said James Symington; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 19th day of April, A. D. 1887.

Whereas the above-named J. C. Anderson, as administrator as aforesaid; Thomas Emmett Wilson, Sarah J. Davis, and George W. Davis have taken an appeal to the Supreme Court of the United States to reverse the decree rendered by the circuit court of the United States for the northern district of Florida, sitting in chancery:

169 Now, therefore, the condition of this obligation is such that if the above-named J. C. Anderson, as administrator of the estate of Edward J. Wilson, deceased; Thomas Emmett Wilson, Sarah J. Davis, and George W. Davis shall prosecute their said appeal to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

J. C. ANDERSON, [SEAL.]
As Administrator of Estate of Edward J. Wilson.
THOS. EMMETT WILSON. [SEAL.]
S. J. DAVIS. [SEAL.]
GEO. W. DAVIS. [SEAL.]
NAT. POYNTZ. [SEAL.]
T. J. SHINE. [SEAL.]

In the presence of—
E. M. HANDLEY.

STATE OF FLORIDA, *County of Orange,* } *ss:*

Nat. Poyntz and T. J. Shine, being duly sworn, each for himself deposes and says that he is worth the amount of the above and foregoing obligation over and above his just debts and homestead exemptions.

NAT. POYNTZ.
T. J. SHINE.

Sworn and subscribed before me this 19th day of April, A. D. 1887.

[SEAL.] W. H. NALL,
Notary Public.

Endorsement: In the U. S. circuit court, 5th circuit, northern district of Florida. Augustus W. Faber & James S. Watt, as executors of the last will and testament of James Symington, dec'd, *vs.* J. C. Anderson, sheriff of Orange Co. and *ex officio* administrator of the estate of Edw. J. Wilson, dec'd; Sarah J. Davis, *et al.* Appeal bond. Filed May 20, 1887. Philip Walter, clerk.

170 In the U. S. Circuit Court, 5th Circuit, Northern District of Florida.

AUGUSTUS W. FABER and JAMES S. WATT, as Executors of the Last Will and Testament of James Symington, Dec'd,
vs.
J. C. ANDERSON, Sheriff of Orange County and *ex Officio* Administrator of the Estate of Edw. J. Wilson, Deceased; Sarah J. Davis, *et al.*

Philip Walter, Esq., clerk.

SIR: Issue a citation on the appeal prayed by the defendants in the above-stated suit, directed to the complainants, Augustus W. Faber and James S. Watt, as executors of the last will and testament of James Symington, deceased, returnable as directed by law.

Jacksonville, Fla., May 20th, 1887.

FLEMING & DANIEL,
Solicitors for Appellants.

Endorsement: Filed May 20, 1887. Philip Walter, clerk.

171 In the Circuit Court of the United States for the Northern District of Florida.

JAMES S. WATT, as Executor of the Last Will and Testament of James Symington, Deceased,
vs.
J. C. ANDERSON, as Administrator of the Estate of Edward J. Wilson, Deceased; Thomas Emmett Wilson, Sarah J. Davis, and George W. Davis.

Know all men by these presents that we, J. C. Anderson, as administrator of the estate of Edward J. Wilson, deceased; Thomas Emmett Wilson, Sarah J. Davis, and George W. Davis, as principals, and Thomas J. Shine and Nat. Poyntz, P. A. Demins, as sureties, are held and firmly bound unto James S. Watt, as executor of the last will and testament of James Symington, deceased, in the sum of five thousand dollars, to be paid to the said James S. Watt, as executor of said James Symington; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 26th day of May, A. D. 1887.

Whereas the above-named J. C. Anderson, as administrator as aforesaid; Thomas Emmett Wilson, Sarah J. Davis, and George W. Davis have taken an appeal to the Supreme Court of the United States to reverse the decrees and orders rendered on January 19th, 1887, and on April 12th, 1887, by the circuit court of the
172 United States for the northern district of Florida, sitting in chancery:

Now, therefore, the condition of this obligation is such that if the above-named J. C. Anderson, as administrator of the estate of Ed-

ward J. Wilson, deceased; Thomas Emmett Wilson, Sarah J. Davis, and George W. Davis shall prosecute their said appeal to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

J. C. ANDERSON, [SEAL.]
Sheriff of Orange County and ex Officio Administrator of the Estate of Edward J. Wilson Dec'd.
THOS. EMMETT WILSON. [SEAL.]
SARAH J. DAVIS. [SEAL.]
GEO. W. DAVIS. [SEAL.]
T. J. SHINE. [SEAL.]
P. A. DEMINS. [SEAL.]

Witness:
A. E. LEVER.
HELEN WILLIAMS.

STATE OF FLORIDA, *County of Orange,* } ss:

Thomas J. Shine and P. A. Demins, being duly sworn, each for himself deposes and says that he is worth the amount of the above bond, to wit, five thousand dollars, over and above his just debts and homestead exemptions.

T. J. SHINE.
P. A. DEMINS.

Subscribed and sworn before me this 2nd day of June, A. D. 1887.

[SEAL.] J. T. BEEKS,
Notary Public. [SEAL.]

173 STATE OF FLORIDA, *County of Orange,* } ss:

I, T. J. Shine, clerk of the circuit court in and for the county and State aforesaid, do certify that J. T. Beeks is a notary public duly qualified and commissioned; that his commission is dated the 10th day of July, A. D. 1883, and will expire, at the pleasure of the Governor, A. D. 188–; that all his acts and doings as such officer are entitled to full faith and credit.

In witness whereof I have hereunto affixed my hand [SEAL.] and seal of office, at Orlando, Florida, this 2nd day of June, A. D. 1887.

T. J. SHINE, *Clerk,*
By R. T. WAY, *Dep'ty Clerk.*

Endorsement: In the circuit court of the United States, fifth judicial circuit, northern district of Florida. James S. Watt, as executor of the last will, &c., of James Symington, dec'd, *vs.* J. C. Anderson, as administrator of the estate of Ed. J. Wilson, dec'd; Sarah J. Davis, *et al.* Appeal bond. Approved. Thomas Settle, judge. Filed Jun- 7, 1887. Philip Walter, clerk.

174 *Telegram.*

DEFUNIAC SPRINGS, FLORIDA, *March 5th*, 1887.

Philip Walter, clerk, Jacksonville, Fla.:

Enter order *nunc pro tunc* substituting Bird for Driggs, master, in Watt *vs.* Anderson.

THOMAS SETTLE, *Judge.*

* * * * * * *

In compliance with the foregoing telegram, the following order is entered at rules this March 7th, 1887, as of January 19, 1887:

JAMES S. WATT, Executor of Jas. Symington, Dec'd, Complainant,
vs.
J. C. ANDERSON, Administrator of Edward J. Wilson, Dec'd, *et al.*

In this cause it is ordered, adjudged, and decreed as follows:

The original decree of sale entered herein January 19, 1887, in paragraph three thereof, be amended so that Wm. Capers Bird be, and he is hereby, substituted for John S. Driggs, therein appointed master *pro hac vice*, to advertise, conduct, and make such sale.

175 In the United States Circuit Court, 5th Judicial Circuit Northern District of Florida, Jacksonville Division.

JAMES S. WATT, Executor, &c., of James Symington, Dec'd, Complainant,
vs.
J. C. ANDERSON, Administrator of Edward J. Wilson, Dec'd, *et al.*, Defendants.
} In Equity.

I, Philip Walter, clerk of the United States circuit court for the district and circuit aforesaid, do hereby certify that the foregoing record, paged from 1 to 174, inclusive, is a true, full, and complete record of the above-entitled cause from the files & records of my office.

Seal U. S. Circuit Court, Northern Dist. of Florida, Fifth Circuit.

Witness my hand and official seal, at the city of Jacksonville, district and circuit aforesaid, this 21st day of September, 1887, and of our Independence the 112th year.

PHILIP WALTER, *Clerk.*

Endorsed on cover: N. Florida C. C. U. S. No. 138. J. C. Anderson, administrator of the estate of Edward J. Wilson, deceased; Thomas Emmett Wilson, Sarah J. Davis, and George W. Davis, appellants, *vs.* James S. Watt, executor of James Symington, deceased. Filed October 4, 1887.